No. 501 & 502.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Jan. 17, 1901.

No. 501.

HENRY W. DOOLEY, LOUIS G. SMITH and CHARLES W. OGDEN, trading as copartners under the firm name of Dooley, Smith & Company,

Plaintiffs in Error,

vs.

THE UNITED STATES,

Defendant in Error.

No. 502.

SAME

vs.

SAME.

ORAL ARGUMENT AND BRIEF ON JURISDICTION.

HENRY M. WARD,

For Plaintiffs in Error.

C. G. Burgoyne, Wallace and Centre Street, N. Y.

JANUARY 9TH, 1901.

Argument of Mr. Henry M. Ward.

MR. WARD said:

If the Court please, the two Dooley-Smith cases both came up here on writs of error to the United States Circuit Court for the Southern District of New York, and the actions are brought against the United States under the Act of March 3, 1887, known as the Tucker Act. There seems to be some slight misapprehension on the part of the counsel for the Government as to the date when the duties were collected in the first of the Dooley-Smith cases, so I shall state these cases rather fully before entering upon my argument. The plaintiffs in error are all citizens of the State of New York, and shortly prior to the date of the ratification of the treaty of peace, April 11, 1899, one member of the firm, Mr. Dooley, went to San Juan, Porto Rico, and engaged in business there. After the eleventh of April, 1899, when the treaty of peace was ratified, and up to the first of May, 1900, various articles of merchandise were shipped by the members of the firm in New York to Mr. Dooley in San Juan as their agent for the purpose of sale in Porto Rico. These goods, upon their arrival at Porto Rico, were taken into the custody of the military officers of the United States, acting under the order of the President in force at that time, known as the order of January 20, 1899; so that none of the duties in the first Dooley-Smith case were collected at any time before the ratification of the treaty of peace. The duties in the second Dooley-Smith case were all collected under the provisions of the Act of April

12, 1900, commonly known as the Foraker Act. The two cases came up on demurrer, the Government having demurred upon two grounds: First, that the Court had not jurisdiction; and, second, that the petition did not state facts sufficient to constitute a cause of action. The Court sustained the demurrer upon the second ground only; that is to say, it entertained jurisdiction, but decided that we did not state a cause of action, and dismissed the petitions with costs.

The protocol, which was signed on the 12th of August, 1898, provides with regard to Porto Rico that "Spain will cede to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies." This promise in the protocol for the cession of Porto Rico was fulfilled by the treaty which was entered into on December 10, 1898, and which provides by the second article that "Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies." Now, we claim that certainly by the time that this treaty of peace was ratified on the 11th of April, 1899, Porto Rico became a part of the United States, and that the President, in the exercise of his military power, of the power which he had as Commander-in-Chief of the Army, arising out of the occupation by the army, and from the fact that the Spanish sovereignty over the island was entirely relinquished—that the power of the President was then limited to preserving peace and order in the island, and providing in general for purely local matters. He had the power to appoint courts of general local jurisdiction undoubtedly, but that he had the power to interfere with a matter which has been relegated exclusively to Congress—that is to say, the regulation of commerce between the States of the United States and territories belonging to the United States—is a proposition which we deny. That power has been expressly reserved to the

Congress of the United States, and the President, in imposing the duties upon articles brought from the States to Porto Rico was exercising a function which belongs exclusively to Congress. So that we claim with regard to the duties collected in the first Dooley-Smith case that what the President should have done—now in making this statement I differ somewhat with the statement of the counsel who have just argued in the Armstrong case—it seems to me that the evident constitutional and "plain duty" of the President, as soon as Porto Rico had become a part of the United States, whether it became a part of the United States at the date of the treaty of peace or at the date of the ratification of the treaty of peace, was to extend the United States tariff over Porto Rico so as to apply to all articles brought into Porto Rico from foreign countries, and provide for the collection of duties upon such articles; but that he had not the power in the absence of legislation by Congress to impose a tariff, or tax, or duty, call it what you like, upon goods brought into Porto Rico from the United States. Whether Congress had that power or not, the President had no such power vested in him by any provision in the Constitution, and there was no law or act of Congress in force at that time which gave the President any such power. Referring to the brief of the Solicitor General which was filed here yesterday, there is a statement, at page 29, in which I think we can concur. I think there is very little issue between the counsel for the Government and us upon the power of the President in Porto Rico. He says, at the foot of page 29: "The war power that is used in holding and occupying conquered territory is not limited by the needs of the army in its military operations, but extends to the creation and maintenance of a civil government for the occupied territory which will preserve peace and order, furnish security for life and property, and provide revenue, if desirable, for supporting this provisional government." Now, as to his

providing revenue for the support of the provisional Government it may be that he could do that by imposing a tax or a duty or an excise upon property within the limits of Porto Rico, but we claim that he could not impose a tariff duty operating upon citizens of the State of New York when they were bringing their merchandise from the port of New York into Porto Rico. Now, another ground upon which we claim that this action of the President was unauthorized is this—and what I am about to say refers as much to the Armstrong case as to the first Dooley-Smith case, No. 501: before Porto Rico became a part of the United States, while it remained a foreign country, any tax, any duty enforced by the President upon articles sent into Porto Rico from a State was a tax on articles exported from a State, and the power to levy such a tax is prohibited to Congress and to the President alike. I shall take up that point more in detail when I come to discuss the provisions of the Act of April 12th, 1900. It seems to us that the power claimed here for the President is far beyond any power which he, as Commander-in-Chief of the Army, can exercise. It is a power, if he has a power, to tax merchandise coming into Porto Rico from the United States, and is virtually the power to prohibit all commerce between Porto Rico and the United States. He can lay the tax in any manner that he sees fit, and he is not bound by any restrictions, such as are imposed upon the power of Congress in laying taxes.

The functions of the President have been carefully limited to executing laws passed by Congress. It seems to me that in a time of peace, when the territory had been ceded to the United States and the treaty had been ratified by the action of both nations, it was in no sense a military measure, or one having any relation to the government of the Island of Porto Rico, or to the preservation of peace or keeping order within its limits, it was no such measure to impose a

tax or duty upon articles sent out from a State into the island. In discussing the power of Congress in this regard, I shall call your Honors' attention to the case of *Stoutenburgh vs. Hennick*, which relates to the power of the Legislative Assembly of the District of Columbia to impose a tax upon interstate commerce. I will come to that again. Now, there are very few reported cases, it seems to me, which throw much light upon this subject. The principal case I have cited in my brief is *Jecker vs. Montgomery* (13 How., 498), cited at page 25, and I think that that case has not been cited to your Honors at length before in the arguments, and I will briefly refer to it. In that case a ship the "Admittance" (the case arose during the war with Mexico, I think in the year 1847—anyway, it was while the war with Mexico was in progress), the ship "Admittance," belonging to persons engaged in trading with the enemy, with the Mexicans, was captured by a United States sloop of war, the "Portsmouth," and taken into the harbor of Monterey. Monterey at that time was in territory captured from Mexico by the American forces, but not as yet ceded to the United States. The Commander of the Navy there appointed a Prize Court under orders of the President to exercise Admiralty jurisdiction in cases of capture. The ship "Admittance," as I say, was taken into Monterey, was brought before this Court as prize, and the Court made an adjudication condemning the vessel as lawful prize and directing that the vessel and cargo should be sold. The sale took place and the proceeds of the sale were kept by Captain Montgomery for some time. Subsequently the owners of the cargo filed a libel in the Admiralty Court for the District of Columbia against Montgomery, praying that he be compelled to bring the cargo within the jurisdiction of that Court and institute proceedings to show lawful cause for the seizure and so forth. One of the separate defenses in Montgomery's answer was that the judgment of the Prize Court at Monterey was conclusive. This defense was

demurred to, and the case came before this Court on appeal, and Mr. Justice TANEY, writing the opinion, held that, although this prize Court held its sessions in a merely conquerred territory then under military occupation, which was not a part of the United States, yet the President had no power under the Constitution to establish it; that that power was exclusively vested in Congress, and that, therefore, the judgment and decree of this Prize Court was an absolute nullity. Now, this, together with what has been said by the counsel in the Armstrong case, and what I am about to say with regard to the power of Congress in imposing this tax of April 12, 1900, is all I intend to say in my argument about the power of the President.

The Act of April 12, 1900, took effect on the 1st of May, and under this act the duties involved in the second Dooley case were collected. And I may say that the second Dooley-Smith case, No. 502, is the only one of this series of cases in which duties were collected at Porto Rico under the Act of Congress of April 12, 1900, upon articles of merchandise brought from the States to Porto Rico. Now, I may say with regard to that Act of April 12, 1900, that the terms of it which impose duties upon articles brought from the States into Porto Rico, and brought from Porto Rico into the States, are entirely separate and distinct from the general scheme of the act which is to provide for the government of Porto Rico. These duties are merely temporary in their nature. They are to last in no event longer than the 1st of March, 1902, and there is an express provision in the act that as soon as the government has been established on the island and has put in force a system of local taxation, and the President has made proclamation of that fact, then all these duties upon goods coming into Porto Rico from the States, and coming into the States from Porto Rico, shall cease. So that this portion of the act, it seems to me, is not entitled to the same presumptions in favor of its validity as are most of the acts passed by

Congress imposing general customs or internal revenue taxes, for it is a sort of a makeshift measure. It is an attempt, apparently, by Congress to provide some sort of a revenue for Porto Rico ; but we claim that, in attempting to provide such revenue by laying duties on commerce between the States and Porto Rico, Congress has exceeded its powers. The duties in question are imposed by the third section of the act, and the second section provides that, from the time of the passage of the act, the same tariffs, customs and duties shall be levied upon articles imported into Porto Rico from ports other than those of the United States—that is to say, from foreign countries—as are now collected by law upon articles imported into the United States from foreign countries, with the exception that coffee in the bean is subject in Porto Rico to a duty of five cents a pound, while under the Tariff Act of 1897 coffee in the bean is not subject to any duty in other ports of the United States. And there is further provision that Spanish scientific, literary and artistic works shall be admitted free of duty into Porto Rico for ten years, to carry out a provision in the treaty to the same effect. The provisions of section third, imposing duties upon the commerce between the States and Porto Rico, are set forth at the foot of page 9 and the top of page 10 of my brief. They read: "That on and after the passage of this Act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States, shall be entered at the several ports of entry upon the payment of fifteen per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries; and, in addition thereto, upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale upon payment of a tax equal to the Internal Revenue tax imposed in the United States

upon like articles of domestic manufacture." There is a further provision that articles of merchandise manufactured in the United States coming into Porto Rico shall, after they have been entered at the ports of entry, be subject to whatever Internal Revenue taxes may be in force in the island. I have already referred your Honors to the provisions respecting the time during which this duty shall be in force—in no event longer than the 1st of March, 1902—and they shall cease as soon as the local Legislature there has provided for a system of local taxation. There is a further provision coming at the end of the fourth section, quoted at page 11 of my brief, that as soon as the civil government of Porto Rico shall have been organized in accordance with the provisions of this act, and notice thereof shall have been given to the President, he shall make proclamation thereof, and that thereafter all collections of duties and taxes in Porto Rico under the provisions of this Act shall be paid into the Treasury of Porto Rico instead of being paid into the Treasury of the United States. Now, it seems clear from the language of this act that, until the organization of such local government, all the duties which are collected in Porto Rico, whether upon articles imported there from foreign countries or upon articles brought there from other parts of the United States, are paid into the United States Treasury, together with the gross amount of duties collected in the ports of the United States upon articles brought from Porto Rico; they are not paid into the general fund of the Treasury, but they are held there as a separate fund; and by another portion of the act they are placed at the disposal of the President for the use and benefit of Porto Rico. So apparently this act while it provides for the collection of duties at the ports of the United States, is unintended as an appropriation of the money so collected to be used for the benefit entirely of Porto Rico.

Now, on reading this act certain questions will immediately occur to one. In the first place what is

meant by the term "United States" as used in the act where it speaks of articles of merchandise brought into "the United States" from Porto Rico and brought into Porto Rico from "the United States." Does it mean the United States as it was constituted before the war with Spain in 1898, or does it mean simply the 45 States of the United States exclusive of the territories of Arizona, New Mexico, the District of Columbia and Alaska, or does it mean the United States comprising the other new possessions or territory, the Philippine Islands and Hawaii? I suppose that what is meant is the United States as constituted before the war with Spain, and that all articles of merchandise shipped from Porto Rico to any port of the United States as so constituted are subject to this duty; whereas, articles of merchandise or commerce between Porto Rico and the Philippine Islands or Hawaii are not subjected by this act to the imposition of any duty whatever; but that is a question upon which the language of the act does not throw any particular light. Another question with regard to these duties is whether they are in fact customs duties; that is to say, imposts upon commerce between the States and Porto Rico—whether they are in fact customs duties or whether they are of the nature of Internal Revenue or excise taxes. There is very strong authority for holding—I think it was distinctly held in the case of *Woodruff vs. Parham*, in 8 Wallace, 123—that customs duties or imposts—imposts being the word used in the eighth section of the first article of the Constitution—can only be imposed upon articles of merchandise coming into the United States from foreign countries, and that one cannot speak of a customs tariff or imposts upon commerce between component parts of the United States. But, whether customs duties or excises, are they subject to the requirement of uniformity throughout the United States; and, if so, has that requirement been met in this act? Now, I understand

the present position of the Government's counsel upon this point, as stated at page 80 of the Solicitor-General's brief, to be that all the taxes upon the commerce between the various other parts of the United States and Porto Rico are not duties levied by Congress under the general taxing power, contained in the 8th section of the 1st article, but that they are local taxes, in the imposition of which Congress is not limited by this clause; that they are to be treated as taxes imposed upon property in Porto Rico for the benefit exclusively of Porto Rico, just as a tax is levied in the Territory of Arizona by the local Legislature, the proceeds of which are applied exclusively for the benefit of Arizona. It seems to me, in the first place, with regard to this contention, that it is impossible in the nature of things to say that a tax levied and collected at the ports of the States upon articles brought there from the Island of Porto Rico is a local tax imposed by Congress under its power to govern Porto Rico. Congress, when acting in relation to the government of Porto Rico, in providing a form of government for the island, can only enforce laws passed in that connection within the territorial limits of the island. Perhaps it will make the distinction that I have in mind somewhat clearer to imagine an act of this kind having been passed by the local Legislature of Porto Rico. Supposing, for the argument, that the United States had given the local Legislature of the Territory the same authority over local matters in Porto Rico which it itself possesses. An act passed by such a local Legislature, however broad its powers, could not possibly impose a tax to be collected in the ports of the States. No local Legislature would have the power to send its officers to the ports of a sovereign State to collect taxes there, nor could it impose a tax upon articles brought into Porto Rico from the States, because a tax of that character would be an interference with interstate commerce, under the decision of this Court, it seems to me, in *Stoutenburgh*

vs. Hennick. Let me refer your Honors a moment to that decision. The case is reported in 129 United States, at page 141. In that case the Legislative Assembly of the District of Columbia, which had been invested by Congress with general municipal powers, had imposed a license tax upon drummers; that is, upon parties selling their goods within the District of Columbia by sample, the goods being brought from other States into the District of Columbia. I have not stated this case at any length in my brief, as it has been cited in other briefs of counsel, but I would refer your Honors to it particularly. The decision is a very short one, and it seems to me that it is right in point upon this proposition. The opinion was rendered by Chief Justice FULLER, concurred in by all the other Justices except Mr. Justice MILLER.

This decision puts commerce between the States and the District of Columbia upon the same footing as commerce between the several States, and decides that the local Legislature could no more regulate such commerce by requiring persons engaged in such commerce to pay a tax than could the Legislature of a State. That this is the meaning of this decision is made evident by the dissenting opinion of Mr. Justice MILLER, who bases his dissent upon the point that commerce between the District and a State is not interstate commerce, and hence can be regulated by the local assembly.

This case of *Stoutenburgh vs. Hennick* is not a mere isolated decision, but has been followed in four or five other decisions of this Court as an authority upon the proposition that the State Legislatures cannot interfere with interstate commerce (*McCall vs. California*, 136 U. S., 104, at 110; *Crutcher vs. Kentucky*, 141 U. S., 47, at 58; *Emert vs. Missouri*, 156 U. S., 296, at 320; *Brennan vs. Titusville*, 153 U. S., 289, at 305).

Now, another point with regard to this proposition: The power to regulate interstate commerce, expressly delegated to Congress by the Constitution, must neces-

sarily include commerce between the States and the Territories; for, otherwise, if Congress has not the exclusive power of regulation, then the States have the power to impose a duty or tax upon all articles produced in a Territory and brought within their borders; California has the power to tax or exclude the products of New Mexico; and New York or any other State, has the power to tax or exclude the products of Porto Rico, Hawaii, the Philippines, Alaska, New Mexico, Arizona and the District of Columbia.

It seems to me that, unless the regulation of commerce between States and Territories is within the exclusive power of Congress, then the States have a power by virtue of which all commerce between Porto Rico and the States can be *prohibited* and the island utterly ruined—a power which they certainly did not have while Porto Rico was still a foreign country. All the recent acts allowing the States to exercise their police power with respect to prohibiting the importation or sale of intoxicating liquors, which are the subject of interstate commerce, which are referred to, in the case of *Vance vs. Vandercook Company* (170 U. S., 438), and numerous other recent decisions put the Territories upon the same footing as the States and give the Territorial Legislatures the same power as the State Legislatures to exercise their police powers upon spirituous liquors, when they are the subject of interstate commerce. There is very strong authority for holding that Congress cannot tax interstate commerce at all, and commerce between States and Territories must stand, as I have said, upon the same footing.

Mr. Tucker in his work on the Constitution, at §256, after referring to *Slaughter House Cases* and to *Stoutenburgh vs. Hennick*, says, page 533:

> "These considerations conclusively show that the power to regulate interstate commerce is not commensurate with the power of Congress to regulate foreign commerce; and, while it may

prohibit the transitus of persons from foreign countries into the United States as a whole, and prohibit commerce in things by embargo, yet no such power is vested in Congress as to interstate commerce. A confirmation of this conclusion might be derived from the requirement of uniformity of duties, imposts and excises; and from the prohibition upon Congress of making any regulation of commerce which would give preference to the ports of one State over those of another. The whole Constitution in all of its parts looks to the security of free trade in persons and goods between the States of the Union, and by this clause prohibits either Congress or the States to interfere with this freedom of intercourse and trade."

But, if Congress has the power to tax interstate commerce, such tax equally with a tax on foreign commerce, must be imposed not by a local, but by a general, law, operating uniformly throughout the land. The only power of general taxation granted to Congress is that contained in the eighth section of the first article, and the power thus granted cannot be exercised anywhere without regard to the limitation of uniformity. Now, I think it is almost conceded by the counsel for the Government in this case that if Porto Rico is a part of the United States, and if the uniformity clause applies to the territories as well as to the States, then this tax is not uniform throughout the United States. It seems to me that it cannot be so considered. If it is uniform, then any duty upon the commerce of a particular State would be equally as uniform as this tax. The argument that it applies uniformly throughout the rest of the United States; that no distinction is made between the State of New York, the State of Florida, the State of Pennsylvania; that goods coming to these States from Porto Rico are all taxed alike, it seems to me does not meet the question, because here are articles of commerce between a particular Territory and the rest of the country which are taxed, while the same articles

of commerce between the other Territories of New Mexico, Arizona and Alaska and the remainder of the country are free from any tax. So it seems to me that the point which was suggested by some of the Justices during Mr. Coudert's argument as to whether or not Congress is limited in imposing a local tax for local purposes in a territory by the "uniformity clause," does not apply to this act; for this is not a local tax imposed solely within the territory of Porto Rico, but it is imposed as well at the ports of every State to which goods come from Porto Rico, and it affects not only the inhabitants of Porto Rico, people living within the territorial limits of that island, but it affects every citizen of the United States who carries on commerce between a State where he lives and the island. The taxes in this Dooley-Smith case and many others which must arise are paid, not by the people of Porto Rico who are enjoying the benefits of the Government there, but by the citizens of the State of New York who send their goods down there for sale and the tax is imposed upon these articles of merchandise while they are in the course of transit between New York and San Juan, before they have become mingled with the general mass of property in the island, and as the Attorney-General says in the brief in the Goetze case (p. 6), they are imposed because of the fact of shipment from a port of the United States to a port in the Island of Porto Rico. It is not in any sense of the word a local tax, and consequently Congress in imposing it is limited by the 8th section of the 1st article, which I have just quoted.

I have devoted a considerable part of my brief to showing, or attempting to show, that an organized Territory is for many other purposes to be treated as a State, in order that the Constitution may have a consistent and uniform operation throughout the country. For example, the 4th article of the Constitution provides that "full faith and credit shall be given in each

State to the public acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such acts, etc., shall be proved." Since the earliest times Congress has passed laws providing for the manner in which acts of a Territorial Legislature and proceedings of Territorial Courts shall be proved in the States and the validity of such acts, it seems to me, has never been questioned, and yet they are not acts which relate to the government of the Territory, but they are passed in exercise of this power granted by this section. Then the clause of the Constitution granting Congress the power to provide for the extradition of fugitive criminals from one State into another has been exercised by Congress in passing laws providing for the extradition of fugitives from a State into a Territory, providing that they should be surrendered up by the executive authority of the Territory to the executive authority of the State, and, also, that fugitives from a Territory into a State should be rendered up by the authorities of the State to the authorities of the Territory. In the case of *Roberts vs. Reilly*, 116 U. S., at 94, cited on page 38 of my brief, the Court held that the power of Congress to pass acts of this kind (although the question of their validity with regard to the Territories was not directly in question) was undoubted.

It seems to me that we need not go into the question in these cases of how far the first eight amendments extend over the Territories, because the counsel for the Government in the Solicitor General's brief have virtually conceded that the general limitations apply to Congress when legislating for the Territories as well as when legislating for the States. The Solicitor General says at the foot of page 57 of his brief that, " if there are any who believe that the President or Congress can govern the new possessions outside the Constitution and wholly irrespective of all its limitations, I am not of them. Neither the Executive nor Legislative nor Ju-

dicial branches of the Federal Government can act except through a power conferred by the Constitution; and, wherever a particular power is exercised, the limitation placed upon it by the Constitution must be observed." Now that is precisely the point for which we have been contending: that every limitation in the Constitution upon the powers of Congress applies to it in legislating with regard to the Territories, except such limitations as are specifically applicable to legislation with regard to the States. And unless the duties imposed by this act of April 12, 1900, upon commerce between the States and the Island of Porto Rico, can be sustained under the local power of taxation which Congress has in the Territories, they cannot be sustained under the general taxing power, because such duties are not uniform throughout the United States.

Coming now to the point stated in my brief at page 43, that these duties violate the Constitution because laid on articles exported from a State, I may say that this objection applies to all the duties in suit in the two *Dooley-Smith* cases, and to those involved in the *Armstrong* case as well, to the duties collected before the ratification of the treaty by order of the President, and to those collected by his order after the ratification, and to those collected under the Act of Congress.

In all these cases the collection of the duties was in violation of the plain language of the ninth section of the first article of the constitution which reads:

> "No tax or duty shall be laid on articles exported from any State."

The President's order of January 20th, 1899, quoted at page 4 of my brief, imposes this tax as a "tariff of duties and taxes," and the order of August 19th, 1898, was similar in form. These orders of the President imposed the same duties upon goods brought into Porto Rico whether from a port of the United

States or from a port of a foreign country. The act of Congress imposed upon goods brought from ports of the United States 15 per cent. of the duties imposed upon goods brought from foreign countries. In both cases, as it is well stated by the Attorney-General in his brief in the Goetze case (p. 6), the basis of these duties is "not ownership, but (1) the geographical origin of the shipment, and (2) the nature of the goods. The duty is imposed against merchandise, not the importer."

In other words, the duties are laid against the goods because their geographical origin is a State, and it becomes necessary, therefore, to determine whether these articles, when shipped from New York to Porto Rico are "exported," and, if so, for how long they retain their distinctive character of "articles exported from a State," so as to be within the constitutional prohibition.

We insist, in the first place, that for as long as Porto Rico remained a foreign country articles brought there from a State were exported from the State. Of this there can be no doubt; a more difficult question is as to whether articles sent to Porto Rico after it became a part of the United States were "exported." It seems to us that by specifying that not merely "articles exported"—that is to say, exported from the United States to foreign countries—should not be taxed, but that no tax should be laid on articles exported from any State, the framers of the Constitution meant to include articles exported from a State to any other part of the United States as well as articles exported to a foreign country. This view is strongly confirmed by the following clause in the ninth section of the first article, which provides that:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another."

This clause clearly prohibits the laying of any duties upon vessels bound from one State to another, and it would be a very singular and awkward construction to hold that while the vessels could not be "obliged to pay duties," yet that duties could be laid upon their cargoes, consisting necessarily of "articles exported from a State."

In common parlance the term "articles exported" is not limited to "articles exported from the United States to a foreign country;" on the contrary, it is usual to speak of articles being exported from one part of the country to another. The words "exports" and "exportation" are thus used in the opinions in *Coe vs. Errol*, 116 U. S., 525, 526 and 527, and in *Turpin vs. Burgess*, 117 U. S., at 506, 507. Some meaning must be given to the words "exported from any State" as distinguished from the word "exports" in the clause in the 10th section of the first article which prohibits the States from laying any imposts or duties on exports.

This distinction is clearly brought out in the well-considered decision of Mr. Justice MILLER in the case of *Woodruff vs. Parham*, 8 Wall., 123, at 132, where he says, speaking of the general power of Congress to lay "taxes, duties, imposts and excises":

> "Is the word impost, as here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried into one State from another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for *no article can be imported from one State into another which is not at the same time exported from the former.*"

We insist, therefore, in the first place, that these articles so brought into Porto Rico were articles ex-

ported from a State. The next question is whether the constitutional prohibition was evaded by deferring the collection of these duties until the entry of the goods at the port in Porto Rico. It is suggested in the brief of the Solicitor-General, at page 82, that the duty is not laid upon articles exported from a State, but upon articles imported into Porto Rico. On the other hand, the Attorney-General suggests, at page 18 of his brief, with regard to the duties collected at the State ports upon articles brought from Porto Rico:

> "it is not perceived that to withhold the levy of the tax until the merchandise is brought into a port of the United States modifies or destroys the power to tax for such local purposes. The tax may be imposed in Porto Rico or held in abeyance until the merchandise reaches a port in the United States, when, as a preliminary to its admission (not after its admission), it may be taxed for the support of the Government of the Island.".

This attempt to argue that an article sent from New York to Porto Rico ceases at some point of the voyage to be an export from New York, and becomes an import into Porto Rico, loses sight of the natural meaning of the words "export" and "import." The terms are correlative. One cannot conceive of an article being imported to one place without its being exported from another. From the moment that the transportation begins, during the entire journey, and until the article has passed through the Custom House, and has become mingled with the general mass of property in the island, it is distinguished from other articles by being at once exported from New York and imported to Porto Rico.

It does not matter whether the duty is imposed at the moment the articles leave the port of export or at any time during the voyage, or at the moment of entry at Porto Rico. In any case the duties are imposed while the articles are being exported from New York, and while they are being imported into Porto Rico, because of such exportation from New York, and be-

cause of such importation into Porto Rico. The journey cannot be completed, the goods cannot be entered at the port, be brought within the limits of the island or delivered to the consignee until the duty is paid, and by such payment the goods released from the custody of the collector.

This Court has had occasion very recently in the case of *May vs. New Orleans*, 178 U. S., 496, to go over the whole question as to when an imported article retains its character as an import so as to be protected from State taxation, and what is said there with reference to imports applies equally well to exports. In the cases arising under the Act of Congress, it is not the mere fact of importation into Porto Rico which determines the rate of tax, but the fact of exportation from "the United States." If exported from the United States they pay fifteen per cent., if from any foreign country one hundred per cent.

Chief-Justice MARSHALL gives an apt illustration of the point that the tax is none the less on articles exported from a State because collected outside the State. He says:

> "Suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries, would it be received as an excuse for this outrage, were the Government to say that exportation meant no more than carrying goods out of the country, and, as the prohibition to lay a tax on imports or things imported ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?"
>
> *Brown vs. Maryland*, 12 Wheat., at 445.

Whatever may be the decision with regard to the duties on articles brought into the States from Porto Rico, the articles brought into Porto Rico from the States were all exported from a State, and so not sub-

ject to taxation until they had been so acted upon as to become mingled with the general stock of property on the island.

JURISDICTION.

I would like to add a few words on the question of jurisdiction.

These actions are brought under the Act of March 3d, 1887, known as the Tucker Act, 24 Stat., 505, which gives the Court of Claims jurisdiction of

> "All claims founded upon the Constitution of the United States or any law of Congress, * * * or upon any contract, expressed or implied, with the Government of the United States, or for damages liquidated or unliquidated in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty if the United States were suable,"

and gives the circuit courts concurrent jurisdiction with the court of claims in certain cases.

There is no question but that the Circuit Court had jurisdiction if the suit could have been brought in the Court of Claims.

The Solicitor-General argues (Brief, pp. 23-26) that these are "revenue cases," and that therefore they cannot be brought under the Tucker Act, under the authority of *Nichol's Case*, 7 Wall. 129, and the other cases which he cites.

A reference to these other cases, however, shows that they were all actions "sounding in tort" and not based upon any contract express or implied, nor upon the Constitution, while the ground upon which jurisdiction was denied in *Nichols Case* was that a full and adequate statutory remedy existed and that such remedy was necessarily exclusive.

The claims in suit are based upon rights secured to the plaintiffs by the Constitution. The duties were

paid to the military authorities in the one case and to the customs authorities in the other in order that plaintiffs might obtain possession of their property. Plaintiffs' title to such property was not disputed by the Government or any of its officers, but the duties were exacted in each case under the authority of the United States, and the moneys collected were received and are now held by the United States.

These actions are, therefore, in the nature of actions for money had and received, and come within the decisions in *Medbury vs. U. S.*, 173 U. S., 492 at 498, and *Swift Co. vs. U. S.*, 111 U. S., 22, at 28.

The Solicitor General suggests that the proper procedure would have been to appeal from the decision of the Collector to the Board of General Appraisers under the Customs Administrative Act of June 10, 1890 (26 Stat., 131). In answer to this suggestion we need only refer to the very clear and convincing argument in Mr. Coudert's brief in *De Lima vs. Bidwell*. No question of constitutionality could have been raised or determined under that procedure, supposing it to apply to duties upon goods sent from a State to Porto Rico. It is evident, therefore, that the Customs Administrative Act does not afford any remedy applicable to these cases. No special statutory form of procedure having been provided the plaintiffs were limited to their action in the Court of Claims, or possibly to an action at common law against the Collector. An action, however, against the Collector would not have been maintainable under any statute, and therefore that form of action, supposing it to exist, is not exclusive, so the decisions based on *Nichols Case* do not apply.

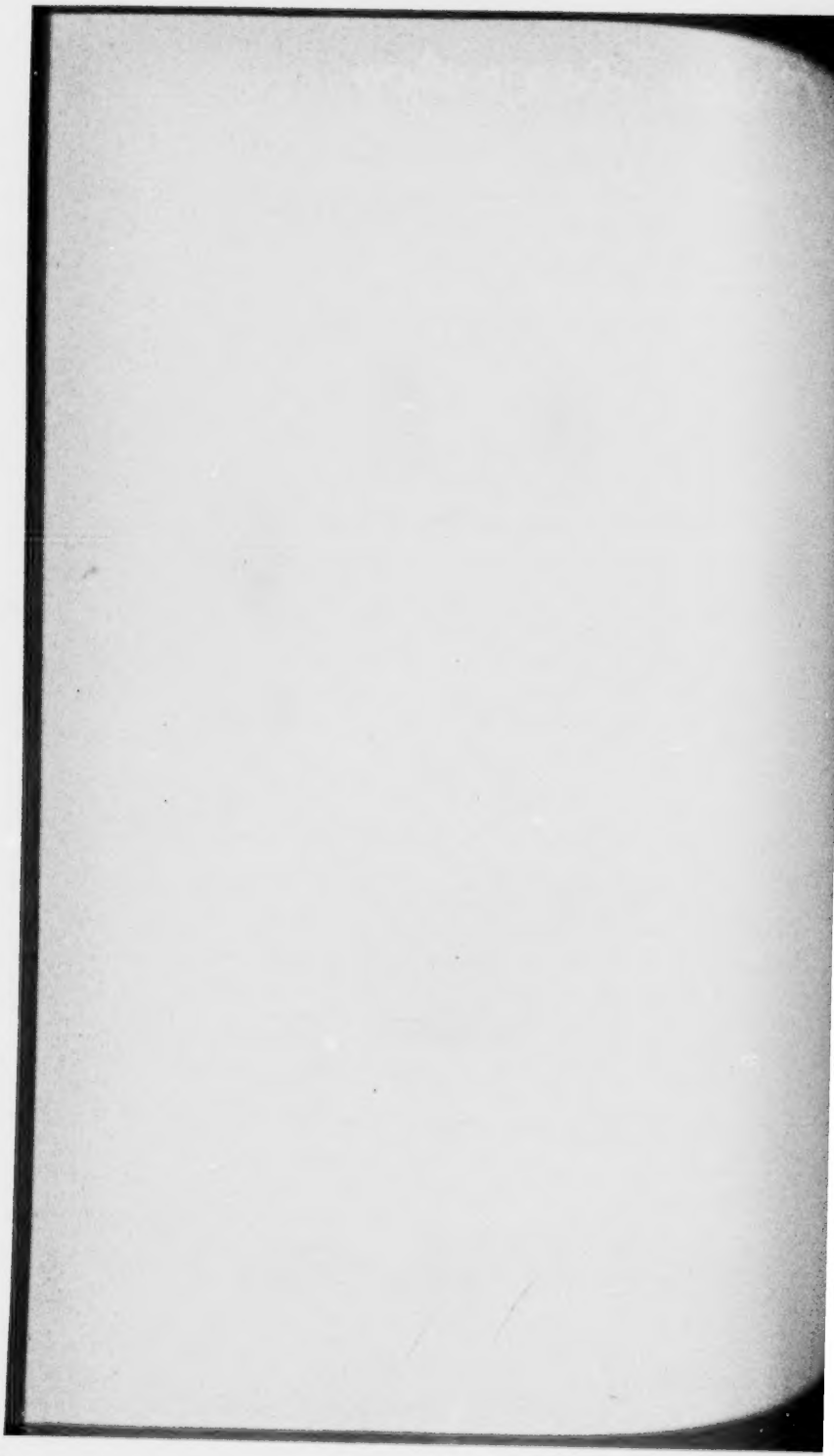
The jurisdiction of the court below may also be sustained under the decision in *Ingram's Case* (32 Ct. Cl., 147). That decision contains a full discussion of the jurisdiction conferred by the Tucker Act and it has been followed in many instances by the Court of Claims. While the judgment was reversed on ap-

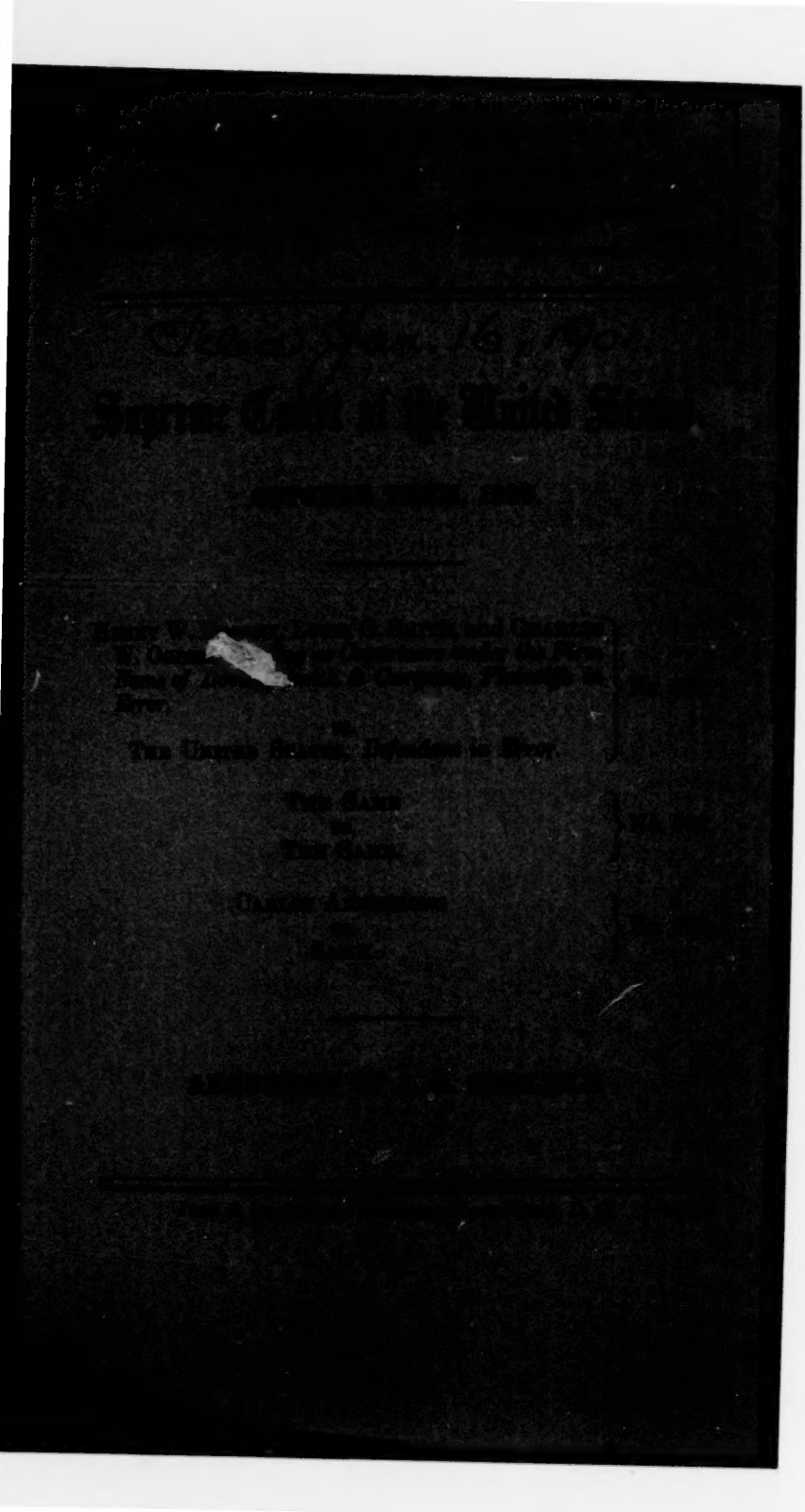
peal (172 U. S., 327), no question was made but that the Court of Claims had jurisdiction of the action.

In these cases the court below entertained jurisdiction of the subject matter and the procedure followed is substantially that adopted in the recent case of *Sherman vs. U. S.* (178 U. S., 150), in which jurisdiction was entertained both by the trial court and by this court on writ of error.

We therefore submit that the court below had jurisdiction under the Tucker Act and that the merits of the case have been properly brought before this Court for determination.

HENRY M. WARD,
For Plaintiffs in Error.





ARGUMENT OF JOHN G. CARLISLE, ESQ.

Mr. CARLISLE: May it please the court. After the protracted discussion which has already taken place in these cases, and in others involving some of the same questions, I am not disposed to extend it unnecessarily by any preliminary remarks, and will therefore proceed at once to the consideration of the matters involved. In doing so I shall not discuss any questions of policy, because they belong exclusively to another forum. We are here to discuss, and this court is here to decide, constitutional and legal questions only; and in deciding such questions the court must be, as it always has been, guided by the Constitution and laws themselves. After reading the printed arguments and listening to the oral arguments of counsel for the Government, I am not sure, at least I am not quite sure, that I yet understand the exact positions taken by them; but I will endeavor to formulate what I conceive to be the contentions of counsel.

As I understand their position, they now insist that the island of Porto Rico did not become a part of the United States, in a constitutional and legal sense, by conquest and a surrender or abandonment of Spanish sovereignty over it at the date of the protocol, or by the cession at the date of the treaty, or even by the final ratification of the treaty by both governments.

That although it is not a part of the United States, except

geographically and in an "international" sense, whatever that may mean, it was, from the time when our occupation became permanent in its character, subject to the jurisdiction of the United States, and that this jurisdiction could be lawfully exercised over the persons and property of the inhabitants of the island in any manner the authorities of the United States might choose, subject to some of the prohibitions and limitations of the Constitution, which are not specified in either the oral or printed arguments, and subject also to some of the principles concerning the rights of persons and property underlying the Constitution.

That during the period between the acquisition of the island by the United States and the enactment of a law by Congress recognizing it as a part of the United States, however long or short that period might be, the President of the United States had the power to govern the inhabitants and all others within its limits, and to make and enforce such laws, orders, and rules and regulations concerning their social relations, their internal and external trade, and their personal and property rights as he might choose, subject only to the laws of war as established and defined by international law.

That the island will not become a part of the United States in the constitutional sense until it has been admitted as a State into the Union, and that until to that time its inhabitants, whether natives of the island or citizens of the United States domiciled there, or sojourning there, are not protected in their person or property by the Constitution, except, as I have said, by certain unspecified prohibitions and limitations contained in the Constitution and possibly by some of the principles which underlie it. From these premises they conclude that the island of Porto Rico, not being a State,

and not being a part of the United States, the constitutional requirement that duties, imposts, and excises shall be uniform throughout the United States has no application to it. If your honors please, we do not concede that the tax of which we complain in these cases can be sustained, whether they are or are not embraced in this provision of the Constitution, for I shall endeavor to show the court before I conclude that Congress had no power to levy and collect such a tax, whether it be uniform or not.

But before entering upon the discussion of the question of Executive or Congressional power, it is necessary to ascertain at what time the island of Porto Rico became subject to the dominion and authority of the United States Government, and the decision of this question depends upon certain facts and upon the application of the principles of international law to these facts—not for the purpose of determining the power to acquire it, or the extent of the authority to govern it after its acquisition, but in order to ascertain the legal consequences or effect of what was actually done there by the Governments of Spain and the United States. There is no controversy in these cases concerning the power of the United States to acquire territory by conquest, by treaty, or by discovery and occupation. That power is derived from the Constitution, as this court has frequently held, and whether it is implied from the expressly delegated power to make treaties and to declare war, or from the clause which authorizes Congress to admit new States into the Union, or from some other clause, is wholly immaterial for the present. All admit, too, that Spain possessed the power to transfer her sovereignty and dominion over the island and its inhabitants, either by acknowledging their

subjection or conquest by another power and a surrender of her possession and dominion, or by cession of the title in a treaty.

At what time, then, did Spain in fact and in law divest herself of sovereignty and jurisdiction over the island and abandon it to the exclusive possession and control of the United States? The island was invaded by the military forces of the United States and to a certain extent invested by its naval forces. On the 28th of July, 1898, immediately after this invasion, General Miles issued a proclamation to the inhabitants, in which he announced to them that they were released from their political relations with Spain; that the army did not come there to make war upon the people, but, on the contrary, to bring them protection, not only to themselves but to their property, and to promote their prosperity and bestow upon them the immunities and blessings of the liberal institutions of the Government of the United States; and on the next day another order or proclamation was issued by the general in command at Ponce, in which it was announced that the municipal laws, so far as they affected the private rights of persons and property and provided for the punishment of crime, should be continued in force so far as compatible with the new order of things, and should not be suspended unless absolutely necessary to accomplish the objects of the military occupation: that these laws should be administered by the ordinary tribunals, substantially as they were before the occupation, and that all ports and places in the actual possession of the United States forces should be open to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of

the prescribed rates of duty which might be in force at the date of the importation.

While this condition existed negotiations were set on foot which resulted in the protocol of August 12, 1898, by the terms of which it was provided that "Spain will cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrones, to be selected by the United States," and it then provided, among other things, that Spain would "immediately evacuate Cuba, Porto Rico, and other islands now under Spanish sovereignty in the West Indies."

It will be seen from this that the honorable Solicitor General was mistaken in his statement made yesterday, that Spain simply agreed in the protocol that she would cede the island only in case a treaty of peace should be concluded. It was an absolute and unconditional promise.

Now, this was not a mere capitulation by a military commander in the field, but a solemn and effective acknowledgment of an accomplished and permanent conquest of a part of its dominions by the sovereign power of Spain itself, and an express agreement to abandon the conquered territory to the conqueror; and it was abandoned by the withdrawal of the whole Spanish forces, by the surrender to the United States of all public places and public property, and the absolute and permanent cessation of all Spanish authority within the limits of the island, except such only as was necessary in order to execute the provisions of the protocol.

From that time on until the present, although a theoretical, but not actual, state of war existed between the two governments for several months, perfect peace has prevailed

in Porto Rico, and the authority of the United States has not been questioned by the inhabitants, or by Spain, or any other power. If no treaty had thereafter been negotiated, and if no formal cession had thereafter been made, there can be no question but that the island of Porto Rico would have forever remained a part of the possessions and dominions of the United States. It would therefore be a plain denial of the actual facts, and an equally plain misapplication of the law, to say that after all this, the possession and control of the island by the United States were only temporary, such, for instance, as that in Tampico and the State of Tamaulipas during the Mexican war, or such as the British government had at Castine during the war of 1812.

Mr. Justice WHITE: Would the President of the United States, without the concurrence of the treaty-making power, have the right to acquire territory for the United States; is that your conclusion?

Mr. CARLISLE: I will refer presently to a decision of this court showing the effect of such a conquest and occupation. I do not argue that the President can add to the boundaries of the United States in a political sense, and I am stating these facts for the purpose of showing that after the date of that protocol, there was actual peace in Porto Rico, and our possession and authority were intended to be, and were in fact, permanent.

The possession and control of the island since the date of the treaty and since its ratification have been no more permanent or absolute in their character than they were between the date of the protocol and the formal cession. The possession was complete and exclusive; the control was absolute and unquestioned; the sovereign authority of the United

States was acknowledged and obeyed in every part of the island; it was claimed by the United States and recognized by the Kingdom of Spain and by all other governments; and, finally, Spain, in the most solemn manner, by formal cession, ratified and confirmed the authority of the United States over the island without disturbing or even referring to anything that had been done there after the date of the protocol. No restitution of public property was stipulated for; no reservation of any right to question any transaction on the island since the date of the protocol was mentioned; no conditions were imposed upon the title, but the island was ceded absolutely, just as it stood on the day the protocol was signed.

Compare these conditions with the situation existing in Upper California in July, 1846, when, as this court has more than once decided, the conquest of that Territory by the United States was completed. The United States Army captured Monterey on the 7th day of July, 1846; the Mexican forces retreated and left ours in possession, as this court has said, "of a large part of the country." There was no capitulation, no surrender by the Mexican forces; there was no abandonment of sovereignty or jurisdiction by the Mexican government nor any acknowledgment of a conquest. On the contrary, actual hostilities between the two countries continued for nearly two years thereafter, during all of which time the territory occupied by our military forces was subject to recapture by the enemy; but in the case of Stearns against the United States, reported in 6th Wall., 589, where the question was directly involved, this court decided that the conquest was complete on the 7th day of July, 1846; and

in the case of Alexander against Roulet, reported in 13th Wall., 386, the court adhered to that ruling, and then said:

"By the conquest of the country, Mexican rule was dis-
"placed and with it the authority of Mexican officials to
"alienate the public domain, and, as a necessary conse-
"quence of this conquest, the Constitution of the United
"States, which gives to Congress the disposition of the public
"lands, was extended over the Territory of California. Until
"Congress provided a government for the country, it was in
"charge of military governors, who, with the aid of subor-
"dinate officers, exercised municipal authority, but the power
"to grant land or confirm titles was never vested in these
"military governors nor in any person appointed by them."

The granting of titles to the public lands, like the imposition of taxes, is an act of sovereignty, and this court has held in every case coming before it that the Mexican authorities could make no such grants in California after the conquest, although the treaty making the cession of the territory to the United States was not negotiated until 1848. And it has also held in every case coming before it that the Spanish authorities could make no grants of land in the province of Louisiana after the cession to France in 1800, nor grants in Florida after the cession to the United States in 1819. Neither could our military governors or other officials, who succeeded the Spanish or Mexican authorities in the administration of local government, grant titles to lands, for two reasons: first, because, as I have said, it is an act of sovereignty, and neither the President, as commander-in-chief, nor his subordinates in a conquered or ceded country, possess the sovereign power of the United States over general or national subjects, but only a limited local authority for cer-

tain purposes; and, secondly, for the reason given by this court, that when a territory is conquered or ceded it becomes subject to the jurisdiction of the United States, the Constitution becomes operative, and by it the power to dispose of the public lands is given to Congress.

The power to regulate commerce between the States and with foreign nations and with the Indian tribes, the power to impose duties, imposts, and excises, and the power to regulate the value of foreign coins are all sovereign powers and national in their character, and they are all expressly delegated to Congress; but they have all been exercised, or attempted to be exercised, by the President in Porto Rico without consulting Congress, not only between the date of the actual conquest and the date of the treaty, but continuously up to a time long after its ratification. The treaty was signed on the 10th day of December, 1898, agreed to by the Senate of the United States on the 6th day of February, 1899, and the exchange of ratifications was proclaimed on the 11th day of April, 1899. It made an absolute and unconditional cession of the Spanish title to the United States, and thus the possession and such title as had been previously acquired by conquest were irrevocably confirmed. As between the two governments, this treaty took effect from its date, and if there was even a shadow of authority left in Spain after the conquest, it was forever extinguished by the formal cession, and the entire sovereignty and jurisdiction over the island and its inhabitants from that time on, if not before, passed to the United States.

In the case of the United States against Reynes, 50 U. S., 127, this court said:

"In the construction of treaties, the same rules which "govern other compacts properly apply. They must be "considered as binding from the period of their execution; "their operation must be understood to take effect from "that period, unless it shall by some condition or stipulation "in the compact itself, be postponed."

And the court held that the treaty of St. Ildefonso, dated October 1, 1800, by which Spain ceded the province of Louisiana to France, took effect from its date, although possession of the Territory was not delivered until November 30, 1803, more than three years afterwards, and that the treaty of Paris, dated April 30, 1803, by which France ceded the same province to the United States, also took effect from its date, notwithstanding possession was not delivered until December 20, 1803. In fact, this court has decided that our possession of Louisiana was not complete until March, 1804. I refer to Chouteau *vs.* Eckhart, 2 How., 344.

In the Reynes case the court also said:

"The rights and powers of the sovereignty of Spain over "the territory ceased with her transfer of that territory to "another government; they could not exist in two govern-"ments at the same time."

In Davis *vs.* Police Jury of Concordia, 50 U. S., 280, the question was again discussed and many authorities on international law were cited, and the same conclusion was reached, and in the case of Jecker against Magee, 76 U. S., 32, the court laid down the same rule in considering the effect of a treaty between the United States and Switzerland, but held, in accordance with all the authorities on the subject, that private rights of property accruing between the date and the ratification could not be divested.

A great many other authorities might be cited from the decisions of the courts and works on international law, but it is not necessary, for, as we understand the argument of counsel for the Government, their main contention is that, although the island belongs to the United States—is the property of the United States—it will not become a part of the United States and entitled as a matter of right to the protection of the Constitution until Congress has admitted it into the Union as a State; that as long as Congress has not provided by law for the government of the territory acquired as Porto Rico was, the President, in his capacity of Commander-in-chief of the Army and Navy, may govern it substantially according to his own will and pleasure, and that after Congress has assumed control, and until it becomes a State, that body may govern it, subject only to some prohibitions or limitations which have not been defined.

Now, if your honors please, the facts I have stated present the question, what were the powers of the President of the United States over this island, its inhabitants, its interior and its exterior trade, including its commerce with the States, during the interval between the date of the protocol and the date of the treaty, or between the latter date and the date of the ratification, as this court may choose to consider it?

It seems to me that the counsel for the Government have laid the foundations of their argument in these cases on a wrong basis. The real question is, not whether the Constitution extends over the island of Porto Rico and its inhabitants, but whether it extends over the Executive and Congress when they are engaged in enacting laws or making orders and rules and regulations for the government of the island and people? The question is, whether the Consti-

tution is in force here in this Capitol, and whether Congress and the President are or are not bound by its provisions in the exercise of legislative or executive power over every place to which those powers extend?

I will not stop to inquire into the civil or political status of the native inhabitants of Porto Rico. It is sufficient, for the purposes of this argument, to know that they are people—human beings—living on their own lands and in their own houses, transacting their own business, conducting their own schools and colleges, maintaining their own churches and charitable institutions, and that their persons and property are within the jurisdiction of the United States. Whether they are white men or black men, yellow men or brown men, whether we call them citizens or subjects, or merely residents or sojourners within our dominions, does not in the least affect the power of the President or Congress over their persons or property.

This court did not hold that the personal and property rights of a Chinaman were protected by the Constitution because he resided in a State, or because he was a citizen, but because he was a man, and because his person or his property was within the jurisdiction of the United States. But no native inhabitant of Porto Rico is claiming any right, civil or political, in these cases. While the duties and imposts levied by the President and Congress upon goods carried into the island may have been ultimately paid, in whole or in part, by the inhabitants as consumers, no suit could have been brought by any of them to recover what they paid. No such case could be made and none has been attempted; so we are not concerned, except incidentally, about the status of the native inhabitants

of the island; but we are deeply concerned about the status and the powers of the President and Congress as agencies of the Government under the Constitution of the United States. As the head of the executive branch of the Government, as its chief executive officer, the power of the President is to nominate certain classes of officers, and to see that the laws of the United States are faithfully executed. He has no power to make laws, but he participates in the legislative power of Congress to the extent that he possesses a qualified veto on its acts. Whatever power he has in addition to the civil executive authority, specified in the Constitution, is derived from the clause which makes him Commander-in-chief of the Army and Navy; and it was in the exercise, or the supposed exercise, of this power that he attempted to make laws regulating commerce between Porto Rico and foreign countries, and between the island and the several States and organized Territories, and to regulate the value of foreign coins, and impose and collect import duties upon the products of the several States and Territories carried into the island for sale or consumption. I need not now quote the clauses of the Constitution relating to these subjects; they are familiar to the court, and there is no ambiguity about them. The powers of Congress to regulate commerce and the value of foreign coins are, from the very nature of the subjects, necessarily exclusive, and the power to impose duties upon imports is for all practical purposes substantially so, because no other authority can impose them without the consent of Congress.

Can the President, as Commander-in-chief of the Army and Navy, upon the plea that he is simply governing a conquered or ceded district or territory, exercise these great national

legislative powers which affect the whole people of the United States? Could he constitutionally and lawfully do so, even during a temporary and strictly belligerent occupation of the enemy's country? This is a new question in this country, for, so far as we have been able to ascertain, no attempt was ever before made by either a President or Congress to impose duties upon the products of the States or Territories imported into a conquered or ceded district or country, or even into a district or territory temporarily held in subjection by our authorities.

In the Tampico case the Mexican tariff was probably enforced against importations from other countries during the occupation by our officers; but, if so, it was because it was the existing law of the place when the temporary occupation commenced. In the case of California there is no evidence that duties or charges of any kind were ever imposed, after the occupation commenced, upon either the products of the United States or other territories carried into that country, or upon the products of that country carried into the States or other territories. In the Tampico case the district was treated as a foreign country temporarily held by our forces, and duties were collected at our home ports under the then existing general tariff law; while in the California case duties were collected only on foreign goods, a part of the time under a tariff adopted by the military government, and after the ratification they were collected under our general tariff law of 1846, which this court said, in Cross against Harrison, took effect there as soon as notice of the ratification was received.

What we contend for is that even during a temporary military occupation the power of the President as com-

mander-in-chief does not extend beyond the limits of the territory occupied, or such adjoining or adjacent district or country as it may be necessary for him to control in order to protect and provide for the army and successfully prosecute the war, and that the extent of his power within the territory properly controlled by him is to provide for the protection of his army, prosecute the war according to the laws of war, and to establish and maintain for the time being local military governments, and, if necessary for the protection of the people and their property, to establish provisional local courts for the administration of justice in civil and criminal cases and the enforcement of all necessary police regulations. It is essentially a local police power, so far as it relates to the occupied territory and persons and property within it. It has its origin in necessity and it is limited by it. Some government is necessary, and as the former one is displaced, or may be displaced, the military power is substituted for it, but only while the occupation continues. The existing laws, so far as they affect the social and civil rights of the inhabitants, may be retained, if not inconsistent with our Constitution and institutions; but, if retained, they remain in force only by the consent of the occupying or conquering power. It can hardly be disputed that the laws of the former sovereign inconsistent with our Constitution must cease to have any force, and yet the effect of the argument in these cases is that the President may immediately replace them by new laws or make others equally inconsistent with that instrument.

Can the President, under the guise of governing a belligerent district occupied by the army or of governing a completely conquered or ceded country, make a law or order

imposing duties upon goods brought there from the States or Territories of the United States? Is it possible that a local civil government conducted by the officers of the army, a local *de facto* civil government—for that is all it is if continued after the acquisition—conducted by the officers of the army, can exercise greater power than a local *de jure* civil government could exercise if it were there? Unquestionably not; because the military officers are acting there simply for the purpose of preserving order and peace among the inhabitants as a matter of necessity, there being no other authority there to do it.

But what were the powers of the President in Porto Rico after this acquisition was fully accomplished and after peace was declared, when, it is conceded, the island became completely subject to our jurisdiction? It may be granted that from the necessity of the situation it was incumbent upon him to maintain the local *de facto* military government already established so far as it was consistent with our Constitution, and, so far as necessary, to preserve order until Congress should act, still could he make new laws or rules or regulations concerning the relations between the island and other parts of the United States? Could he continue to enforce the laws, rules, and regulations he had already made, if in conflict with the Constitution or the relations created by the act of acquisition, whether that act was the conquest or the treaty? Could he continue to exercise war powers when the war was over and peace had been publicly declared by the political department of the Government—by the President himself? There was no longer a military occupation for belligerent purposes; there was no longer an enemy to subdue or resist; there was no longer a necessity for the

exercise of any power, except to maintain order and administer justice, and for these purposes the civil police and the courts were ample, so far as appears in these cases; but the President, having officially declared that the war was over, continued to exercise war powers to the same extent and for the same purposes as when the war existed. If the war was not over when peace had been declared with Spain, between what governments did it exist, and by what authority was it declared? There were certainly no evidences of war in Porto Rico, except the President's military government.

A large part of the amount sued for in these actions was coerced from the plaintiffs in error under an order of the President after peace was declared and after counsel for the Government admit that the civil authority of the United States over the island could have been completely exercised. So far as the exercise of this military power affected the external commerce of the island, and so far as it regulated the value of foreign coins and imposed duties upon imports into the island, it was nothing more nor less than the enforcement of executive legislation on subjects which were within the exclusive powers of Congress and which did not concern the inhabitants of the island alone, but concerned all the people of the United States who might have occasion to trade there or to sell their products for consumption there. All vessels and their cargoes from the States entering the ports of the island, and all vessels and cargoes clearing from the ports of the island were subject to the regulations made by the President, and every transaction in which the price was fixed or payment was to be made in foreign coins was affected by the order. It affected the whole people of the United States when

they could not trade with the island without having their invoices certified, the value of their goods appraised, oaths and certificates made, fees charged, and duties or taxes collected at the place where they were to be sold before they could be delivered. Besides this, it is undoubtedly true that the market value or selling price of goods for export to a place where duties are charged upon them is materially affected by the imposition of a tax upon them at that place.

There are many distinguished gentlemen who contend that the whole duty is paid by the foreign producer, who, in this case, would be the producer in the States, or the exporter from the States. While we do not agree to this, it is certainly true that the selling price of the goods at the place of production or exportation is to some extent reduced. It is true also that the trade is obstructed and diminished by such taxes and restrictions. What he might do affecting only the people of the territory under the conditions as they existed, and what he might do affecting the personal and property rights of the citizens and inhabitants of the States, are two very different questions.

Laws or executive orders having only local operation in a conquered or ceded territory, if consistent with the Constitution, may very properly be continued in force by the *de facto* military government after the conquest or cession until Congress acts, but laws or orders affecting the commercial and political relations between it and other parts of our territory cannot be constitutionally enforced. The Kearney Code, which was adopted by the military authorities during the belligerent occupation of New Mexico, was purely a system of municipal law. As originally prepared by Colonel Doniphan, with the assistance of a private soldier, it provided

for the election of a governor, members of a Territorial legislature, and a delegate in Congress; but the President promptly disapproved of all those parts of it, and it was put in force only as a local code for the preservation of order, the protection of persons and property, and the administration of justice in local courts. It was preceded by a liberal bill of rights, which I commend to the respectful consideration of those who believe that unlimited power can be exercised anywhere within our jurisdiction. That code was adopted September 22, 1846, and its validity was involved in the case of Leitendorfer *vs.* Webb, 20 How., 177, in which an attachment had been issued against the property of a debtor in the regular course of judicial proceedings, and this court sustained the authority of the President to establisn a municipal government, and held that in the absence of congressional legislation it continued after the conquest or cession. But suppose it had been provided that the creditor himself, or an agent selected by him, might seize and sell the property of his debtor for the payment of the debt without judicial process of any kind, does any one suppose this court would have sanctioned the proceeding, notwithstanding the fact that the government was instituted while a public war was still existing? I think most clearly not.

To conclude what I have to say on this subject, I do not question the power of the President alone to institute local military governments in a territory or district temporarily occupied by the army during the existence of a war, nor do I question the proposition that such governments, so far as they are consistent with our Constitution, continue as governments *de facto* after the war ceases and until Congress legislates upon the subject; but I deny

that he can at any time or in any place assume the powers of legislation over national subjects, such as the regulation of the external commerce of the States and the imposition of taxes and duties upon the products of the States lawfully carried out of the States for sale; and I say that even if he possesses such power during a war and while temporarily occupying the enemy's country, it ceases the moment the country is acquired by the United States, whether by conquest or cession. While war continues he may enforce the laws of war, which prohibit all commercial intercourse with the enemy, but if he does not see proper to do this, and opens the ports under his control generally to the commerce of the world, including his own country, then the laws of his own country, enacted by the competent authority, must govern that commerce; and if this is not so while the war continues, it is certainly so when it is over and when the territory has been acquired by the United States and peace prevails everywhere within our jurisdiction.

When this period arrives the conquered or ceded district becomes at once subject to the jurisdiction of Congress, in which the Constitution has vested the whole legislative power of the Government, although that body may not at once assume its constitutional authority over it; but when it does so, as it did in this case, by the act of April 12, 1900, if not by the act of March 24, 1900, then the question is presented: What is the nature and extent of that authority? Is it limited and controlled by the Constitution? That there are certain limitations upon the power to govern has so often been decided by this court that the question is no longer open for discussion, and we are not aware of any case in which the court has even intimated

that there is any provision of the Constitution which is not in force in a Territory, if it is applicable to the condition of the Territory and its inhabitants. No one contends that the people of the Territories, organized or unorganized, have any political rights conferred upon them by the Constitution. They cannot choose representatives in Congress or elect Senators or vote for presidential electors, or even exercise the right of suffrage without the consent of Congress; but it does not follow from this that they can be governed by Congress according to its own will without regard to the general provisions of the Constitution or the general principles which qualify and restrain all the powers of government in this country.

What is the Constitution? In the first place, it is not only the supreme law of the States composing the Union, but the supreme law of the land; supreme over every branch and department of the Government; supreme over every one exercising authority under the Government; supreme over every other law or order or regulation, and supreme over all the people, wherever they may be, within its jurisdiction, and what we claim is, that so long as this Constitution exists absolute and arbitrary power over the lives, liberties, or property of the people can be exercised nowhere in this Republic.

It is now argued that it is supreme only within the boundaries of the several States, unless Congress extends it to the Territories; that it limits the powers of Congress only when legislating for the geographical area embraced in the States; that the inhabitants of the States are the only people who can, as a matter of right, claim the benefit of its guarantees and prohibitions for the protection even of those per-

sonal and property rights which have for ages been secured by the common law of England, and that all other people within the jurisdiction of the United States are dependent for the protection of their civil rights substantially upon the will of Congress. The question whether the Constitution should be declared to be the supreme law of the whole land, or only the supreme law of the respective States and their inhabitants or citizens, was presented in the Federal Convention of 1787, and was finally disposed of by the adoption of the clause as it now stands in the Constitution, which declares it to be the supreme law of the land.

In the plan proposed by Mr. Charles Pinckney, of South Carolina, it was provided that "all acts made by the legislature of the United States pursuant to this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the land," etc. (1 Elliot, page 46).

Mr. Patterson's plan proposed "that all acts of the United States in Congress assembled made by virtue and in pursuance of the powers hereby vested in them, and by the Articles of Confederation" and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, so far as those acts or treaties shall relate to such States or their citizens," etc. (pages 71, 72).

These plans and others were referred to the Committee of the Whole House and were reported back without any provision upon this subject. Afterwards the Convention unanimously agreed to the following resolution: "That the Legislative acts made by virtue and in pursuance of the Articles of Union and all treaties made and ratified under the authority of the United States, shall be the supreme law of

the respective States, so far as those acts or treaties shall relate to the said States or their citizens or inhabitants" (page 100).

Thus it stood when referred to the committee of five, of which Mr. Rutledge was chairman, and on the 6th of August, 1787, that committee reported back to the convention a draft of the proposed Constitution, the eighth article of which was the same as the resolution last quoted, except that in the place of the words "Articles of Union" it contained the words "this Constitution" (page 120).

This report was considered in the Committee of the Whole, and on the 23d of August the eighth article was unanimously amended so as to read: "This Constitution and all laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States shall be the supreme law of the several States and of their citizens and inhabitants," etc. (page 151).

This was the form in which the article stood when the whole draft was referred to the committee of eleven, but when reported back September 12, it constituted the second clause of the sixth article and declared that the Constitution and laws and the treaties made and to be made should be "the supreme law of the land," and so it now stands as part of the Constitution. If the clause had been adopted in the form agreed to in the committee and inserted in the first draft, there would have been at least a certain degree of plausibility in the argument made here for the Government, but even in that case we think the powers of Congress would have been limited whenever and wherever it might attempt to exercise them. But it is argued here that the history of the Constitution and the language employed in the preamble, and in

some other places, show that it was intended to establish a government only for such of the States then existing as might ratify it, and such other States as might thereafter be admitted into the Union, and that, therefore, while it confers power upon Congress to govern Territories, it does not require that body to govern them in accordance with the supreme law of the land; that is, in accordance with the instrument from which the power to govern is derived. Even if the premises were true, the conclusion would not follow; but is it true that the Constitution was ordained and established for the government of the States only? If so, how did it happen that the great men who framed that instrument made it confer the power to govern Territories as well as States? It is true that the Constitution was ordained and established by the people of the States, but it created a National Government for national purposes, not a mere league or compact between the States, and jurisdiction was conferred upon that government over the whole national domain, whatever its boundaries might be. It is not true that the Government was established only for the States, their inhabitants or citizens, but if it were true, then it could exercise no power outside of the States, and this court would have to put a new construction upon that provision which authorizes Congress to dispose of and make all needful rules and regulations respecting the territory, or other property, belonging to the United States. The necessary construction of that clause would be that it conferred power only to dispose of land or other property, and to make necessary rules and regulations respecting land or other property belonging to the United States, that is, belonging to the several States composing the Union. It

would confer no power whatever to govern the people outside of the States.

In the course of the argument a great deal has been said about the inherent sovereign power of the United States as an independent nation, and the laws of nations have been frequently referred to in order to show what powers they possess and how they may be exercised in governing conquered or ceded territory. We have no occasion in these cases to dispute the proposition that in all their relations to other nations, and as to all their international interests, duties, and responsibilities, the United States are a separate, independent, and sovereign nation. No other nation can question their sovereignty; no other nation can deny that they represent the whole people and the whole power of a State or nation, as defined in international law. But, in conceding this, we do not admit by any means that international law is the source of the powers exercised by the United States, even in their intercourse or transactions with other nations, except, perhaps, as between them and the other nations.

There is but one source of federal or national power in this country, so far as it affects our internal affairs, and that is the Constitution of the United States. International law cannot confer powers upon the Government or upon any of its agencies, but when a power has been delegated by the Constitution in general terms, without limitation or definition, if the power relates to international matters, or if its exercise affects private rights of persons and property recognized by international law, the courts may look to that law for its definition—that is, to ascertain what is the nature of the power, and what is its extent and the purposes for which

it may be exercised. This is necessarily so, because when the Constitution confers any power in general terms, it must be presumed that the intention was that it should be exercised in accordance with the rules and principles applicable to it as they were then generally understood; and it can be so exercised, unless there is some other part of the Constitution which limits the power in a particular case or class of cases, or unless its exercise would be contrary to the spirit of our institutions.

In brief, while international law is a part of the municipal law of this country, in all cases to which it is applicable, it is not a part of the fundamental or organic law of the land, and therefore it does not create or confer any governmental powers.

The conclusions of the counsel for the Government in these cases, if they can be justified at all, can be justified only by separating that clause of the Constitution upon which they rely from every other part of the Constitution, detaching it from all that precedes and all that follows it, and considering it as a complete and distinct charter for the government of the Territories; and, in addition to this unwarranted departure from the canons of construction, it must be construed independently of the plain spirit of the Constitution and the general character of the institutions established by it. When considered in this way, the result is that we have in fact two constitutions in this country, one applicable to the States composing the Union and their inhabitants, enumerating and limiting the powers of Congress and guaranteeing the essential rights of the people, and the other providing separately for the government of all the territory outside of the States, conferring discretionary powers

upon Congress, and securing no rights to the people. The basis of our argument is exactly the opposite of this, and our contention is that the Constitution contains but one plan or scheme of government; that it must be construed as a whole, and each of its parts so construed as to harmonize all the powers delegated, giving such effect to each one of them as will not make it conflict with any other; that its limitations and prohibitions, express and implied, are general in their application, and restrain the powers of all the agencies of the Government wherever its jurisdiction extends, and must be enforced in all cases to which they are applicable; that every express delegation of power, even though made in the most general terms, is necessarily subject, not only to the express limitations and prohibitions contained in the Constitution, but also to the implied limitation that it can be exercised only to the extent of the grant, and for the purposes of the grant; in short, that all the powers of the Government, whether they be exercised inside or outside of the respective States, are derived from the Constitution and controlled by it.

Many of the general expressions used by this court in the course of its decisions upon the power of Congress over the Territories must, I submit, be qualified by reference to the particular exercise of congressional authority then under consideration. It has been said that the power of Congress over the Territories is "plenary" and "absolute;" so it is in the sense that Congress possesses the highest legislative power that exists anywhere over the subject, just as the power to regulate commerce is plenary, absolute, and exclusive; but neither that power nor any other can be exercised in such a manner as to defeat the operation of other

parts of the Constitution, especially those parts designed for the protection of personal and property rights. When we speak of sovereign power in this country, except when we speak of the power of the people, we mean simply the highest constitutional power over the subject, not the inherent, unqualified power to govern independently of the organic law. In the proper sense of the term, the power over various national subjects is sovereign. Among them are international and interstate commerce, interstate extradition of fugitives from justice, the authentication of State records for use in another State, naturalization, bankruptcy, the government of the Territories of the United States, which are the common property of the people, and direct and indirect taxation. It is declared in the preamble to the Constitution that:

"We, the people of the United States, in order to form a "more perfect union, establish justice, insure domestic tran- "quility, provide for the common defense, promote the gen- "eral welfare and secure the blessings of liberty to ourselves "and our posterity, do ordain and establish this Constitution "for the United States of America."

These are the great general or national purposes for which the Government was created, and the Constitution must be so interpreted as to accomplish them without unjust indiscrimination against any part of the people in the States or elsewhere. In dealing with these great subjects of national concern, there must be uniformity in the legislation respecting each one of them, whether the Constitution uses the words "uniform throughout the United States" or not; and this has been the controlling rule or principle of construction since the organization of the Government. The con-

stitutional provisions upon the subjects mentioned are as follows:

"To regulate commerce with foreign nations and among "the several States and with the Indian tribes" (article 1, sec. 8, clause 3).

"A person charged in any State with treason, felony or "other crime who shall flee from justice and be found in "another State, shall, on the demand of the executive au- "thority of the State from which he fled, be delivered up to "be removed to the State having jurisdiction of the crime" (article 4, sec. 2).

"Full faith and credit shall be given in each State to the "public acts, records and judicial proceedings of every "other State, and the Congress may, by general laws, pre- "scribe the manner in which such acts, records and pro- "ceedings shall be proved and the effect thereof" (article 4, sec. 1).

"To establish an uniform rule of naturalization and uni- "form rules on the subject of bankruptcy throughout the "United States" (article 1, sec. 8, clause 4).

"The Congress shall have power to dispose of and make "all needful rules and regulations respecting the Territory, "or other property, belonging to the United States" (article "4, sec. 3, clause 2).

"Representatives and direct taxes shall be apportioned "among the several States which may be included within "this Union, according to their respective numbers, etc." "(article 1, sec. 2, clause 3).

"No capitation or other direct tax shall be laid, unless in "proportion to the census or enumeration hereinbefore di- "rected to be taken" (article 1, sec. 9, clause 4).

"To lay and collect taxes, duties, imposts and excises, "to pay the debts and provide for the common defense and "general welfare of the United States; but all duties, im- "posts and excises shall be uniform throughout the United "States" (article 1, sec. 8, clause 1).

The powers of Congress are to regulate commerce between the States; to provide for the extradition of fugitives from the justice of one State found in another State; to provide for the authentication of public acts, judicial proceedings and records of one State to be used in another State, and to require full faith and credit to be given to them; to impose direct taxes and apportion them among the States according to representation; to pass uniform laws upon the subjects of naturalization and bankruptcy; to dispose of and make needful rules and regulations respecting the territory, or other property, belonging to the United States, and to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the general welfare and common defense of the United States, with the express qualification or limitation that the duties, imposts, and excises shall be uniform throughout the United States. Upon each one of these subjects Congress has established a harmonious system or body of laws applying to the whole country—to the Territories as well as to the States—and the judiciary has interpreted and applied them, and the President has seen that they were faithfully executed. Never before, so far as I know, has it been contended in argument before this court that the power thus delegated could not apply to the regulation of commerce between the States and the Territories on the ground that the Territories are neither States nor foreign countries. The power to regulate commerce between all the political divisions of the country has been exercised, and is now being exercised, without question in any quarter, except by the conclusions necessarily resulting from the argument made on behalf of the Government in these cases. If Congress

possesses the exclusive power to govern the Territories, it can, of course, regulate the commerce between them; but by what authority, except the authority derived from that part of the Constitution referred to, can it regulate and control the commerce between a Territory and a State? Yet if Congress does not possess this authority, every State in the Union may make such regulations as it chooses respecting the commerce carried on by its citizens with a Territory or with all the Territories. Suppose the legislature of Kansas should enact a statute prohibiting the products of the Territory of Oklahoma from being brought into that State for sale or consumption, or from being carried through the State, or should impose a tax upon such products because they were brought into or carried through the State, would it be a valid law? It certainly would be a valid law, unless Congress possesses the exclusive power to regulate such commerce. This court decided this question, however, when it held in Stoutenberg against Henning, 129 U. S., 141, that the trade between the State of Maryland and the District of Columbia was interstate commerce within the meaning of the Constitution. The exclusive power of Congress to regulate commerce extends under the Constitution all over the United States and includes commerce between the States and Territories, because the Territories are within the United States and parts of the United States, and because the subject to which the power relates is of a national character and is a unit, the proper control of which requires the enactment of uniform and harmonious laws and regulations.

So, too, from the time of the first act upon the subject of interstate extradition, which was passed February 12, 1793, the laws have applied to fugitives escaping from a State to a

Territory and from a Territory to a State, and the State authorities have been required to comply with demands for their surrender made by Territorial governors, and it is so now; and ever since 1804 all the laws of Congress relating to the authentication of public acts, judicial proceedings, and records of the States have applied to the Territories, and the authorities of the States have been, and are now, required to give them full faith and credit. Conceding that Congress has power to govern Territories, and that they are not parts of the United States, or within the United States, then it would follow, of course, that in the exercise of its plenary power over them it might properly require the Territorial authorities to surrender fugitives from the justice of the States and to give full faith and credit to the records of the States when duly certified; but how can it be possible that a mere power to govern the Territories can be so exercised as to require the authorities of the State to surrender a fugitive from the Territory upon the demand of the Territorial governor, or require a State to give full faith and credit to the records of the Territory? When we look at the legislation of Congress on the subjects of naturalization and bankruptcy, which are expressly required to be uniform throughout the United States, we find the same harmonious system established in all respects as to each of them. The first act conferring jurisdiction in cases of naturalization, passed March 26, 1790, did not include the Territorial courts, nor did the first act on the subject of bankruptcy, passed in the year 1800, but the act of January 29, 1795, and all subsequent acts gave Territorial courts jurisdiction in cases of naturalization, and every bankruptcy act passed since that of 1800 conferred jurisdiction upon such

courts to hear and determine cases arising under them and to grant discharges in the same manner as courts sitting in the States. Now, if the Territories are not parts of the United States, and if the Constitution does not extend over them, we have presented by this legislation two remarkable things: First, we have courts held outside of the United States, at places where the Constitution does not extend, admitting aliens to citizenship in the United States; and, secondly, we have the same courts granting absolute discharges to the inhabitants of the Territory from all debts owing by them to citizens of the States, and of the United States; we have courts conferring the rights of citizenship to aliens who have resided five years in a Territory only, when the Territory, according to the argument made here, is no part of the United States; and we have in the bankruptcy cases courts rendering final and conclusive judgments extinguishing the property rights of citizens of the States, and of the United States, who were never within the Territory for a moment and never transacted any business within its boundaries. How can counsel on the other side account for this legislation conferring upon the Territorial courts this jurisdiction over subjects of general and national concern? It can be justified only on the grounds that the Constitution requires the laws on these subjects to be uniform throughout the United States, and that the Territories are within the United States and parts of the United States, and because the subjects themselves are national and permanent in their character, not local or municipal, and the legislation upon them must therefore be uniform and harmonious all over the country, even though those words were not used in the Constitution.

The provisions of the Constitution in relation to the imposition of direct taxes are specific and peculiar. Representation in Congress was recognized as the basis of the right of the General Government to tax the people in that way, and therefore it was provided that they should be apportioned among the several States which may be included in the Union according to their representative population, which should always be ascertained by a census or enumeration. Notwithstanding this specific provision, which would appear to confine the power strictly to the States, Congress has imposed direct taxes for the support of the General Government upon the Territories and the District of Columbia, and has apportioned them according to population in the same manner as in the States. The Constitution does not require this tax to be uniform, except so far as apportionment according to numbers may tend to secure uniformity, but Congress, whenever it imposes direct taxes upon the Territories and the District of Columbia, recognizes that they are entitled to the benefit of the same guarantees against discrimination that are secured to the States by the Constitution. In such cases, as in the case of indirect taxation, as we will see presently, Congress imposes taxes for the support of the Government of the United States upon the people of the Territories, which, according to the argument made here, are not a part of the United States, and in doing so it gives to them the same constitutional protection that is secured to the States and their people. This is done upon practically the same rule of construction that has been adhered to in the application of the Constitution to interstate commerce and all the other subjects of national concern to which I have referred;

and thus, while the taxation itself could not, from the very nature of the specific constitutional provisions respecting it, be made uniform, the system of legislation upon the subject has been made uniform and harmonious throughout the country.

When Congress enacted a law imposing a direct tax upon the District of Columbia it apportioned its quota according to its population, and this was the act considered by the court in Loughborough *vs.* Blake.

As to internal-revenue taxes, which the Attorney General claimed this morning were not imposed by the act of 1791, all that can be correctly said is that it is doubtful whether they were or not. By that act the country was divided into fourteen collection districts, and no Territory was included in a district, but the tax was laid "upon the United States," and we find that in 1794, three years afterwards, Congress passed an act entitled "An act making further provision for securing and collecting the duties upon foreign and domestic spirits, stills, wines, and teas," which provided that:

"In order to facilitate and secure the collection of the revenue on distilled spirits and stills in such States as have been or hereafter may be erected, and in the territory northwest and south of the River Ohio, the President of the United States shall be and he is hereby authorized and empowered to form and erect such new districts, and to make such alterations in and additions to the several districts as from time to time shall appear in his judgment expedient and necessary."

This act plainly appears to have been based upon the theory that the tax was already imposed upon the Territories northwest of the Ohio and those south of it by the act of

1791, but no facilities had been provided for its collection. It is entitled "An act making further provision for securing and collecting" these duties, and its purpose was to provide for their collection in those Territories. It imposed no taxes itself, but it assumed that the taxes had been imposed by the previous act; and if this was correct, it appears that from the very beginning the internal taxes have always been imposed in the Territories of the United States, as well as in the States, unless there is an exception in the Porto Rican act now before the court.

The argument made, that the Territories are not a part of the United States, if true, would result in absolute free trade between Porto Rico and Alaska and New Mexico and Oklahoma and Arizona, because the act says that the so-called duties are imposed upon goods coming from Porto Rico into the United States, which the counsel say does not include the Territories, and goods taken from the United States—that is, the States composing the Union—into Porto Rico; but I think that is a false construction. I think, if this act is valid, it includes the Territories, although not named, and includes goods taken from New Mexico into Porto Rico as well as from New York into Porto Rico, and likewise goods brought from Porto Rico into the States and other Territories.

I come now to consider more particularly the clause of the Constitution which confers upon Congress the power to lay and collect duties, imposts, and excises which the Constitution expressly requires shall be uniform throughout the United States.

Beginning with the act of 1789, passed immediately after the organization of the Government, and following the legis-

lation upon the subject down to the present date, there cannot be found a single tariff act that has not been applied in all its provisions to all the Territories and all the States. There has been no deviation from this practical interpretation of the Constitution for more than a hundred years, during which time a great number of tariff laws have been before Congresses composed of eminent men, who differed widely in their views concerning the nature of the government and the rules of constitutional construction; and these acts have been approved by numerous Presidents, who also entertained conflicting opinions upon the same subjects, and have been enforced by all our judicial tribunals. Upon this one question of the necessity for the imposition of duties, imposts, and excises uniformly throughout the United States—that is, throughout the whole territory over which the United States has jurisdiction—there has never been any difference of opinion in this country, or, if there has, it has never been disclosed in any debate in Congress, or in any message of a President, or in any public document, or in any decision of this court.

Here the court took a recess.

AFTER RECESS.

Mr. CARLISLE: May it please the court, the Attorney General stated in his argument this morning that he had found in the act of 1799 an exception to the rule of uniformity—that is, geographical uniformity, uniformity throughout the United States—and he quoted or referred to a part of the clause upon which his claim was based. I now have that act before me and will read that part upon

which the Attorney General relies. This is the exception to which he refers, but before reading it I will state that under the law, as it existed previous to that time, the importation of goods into this country by land was absolutely prohibited, and they were admitted only at our seaports. This act of 1799 changed the law in that respect, and contained this provision:

"That no duty shall be levied or collected on the importations of peltries brought into the Territories of the United States, nor on the proper goods and effects, of whatever nature, of Indians, passing or repassing the boundary lines, aforesaid, unless the same be goods in bales or other large packages, unusual among Indians, and shall not be considered as goods belonging to *bona fide* Indians, nor be entitled to the exemption from duty, aforesaid."

It is simply an exemption of *bona fide* Indian goods and peltries brought into Northwest Territory for their own use. So I think this court will not consider it any exception at all to the correctness of the general statement made by me.

Mr. Justice GRAY: Will you please be kind enough to read those few words once more?

Mr. CARLISLE: This is section 105 of the act:

"*And be it further enacted*, That no duty shall be levied on the importation of peltries brought into the Territories of the United States, nor on the proper goods and effects of whatever nature of Indians, passing or repassing the boundary line aforesaid, unless the goods be in bales or other large packages, unusual among Indians, which shall not be considered as goods belonging *bona fide* to Indians, nor be entitled to the exemption from duty aforesaid."

Mr. Justice GRAY: Do you understand the purpose of that act limited to that only?

Mr. CARLISLE: Yes; that is the meaning of the language as I understand it.

Mr. Justice BROWN: If there were not some limitation on the size of the packages, the whole country might be flooded with articles of the kind described in the act; it seems to me that there must be some limit.

Mr. CARLISLE: Certainly; and therefore the act imposed a limitation upon the size of the package, and if the articles were brought in a package of a size unusual among Indians, they would not be considered as the *bona fide* goods of Indians, and would not be exempt from the payment of the duty. The act will be found in 1 Stat., p. 702.

Now, if the court please, notwithstanding the numerous questions necessarily involved in the discussion, the precise question to be determined in these cases is one of taxation. What is a tax or duty? Stated in the simplest terms, it is a charge imposed upon property, or upon persons in respect of their property, to raise revenue for the use of the Government. I do not say for public purposes only, because that definition might be too narrow to suit the views of some. It is a mode of taking private property for public use, and the compensation is supposed to consist in the protection which the citizen receives, or in the benefits which he derives, from the exercise of the powers of the Government. The right to be exempt from illegal taxation is a property right, and when the Government takes from one man what is plainly more than his just share of the burden it is not taxation; and when it undertakes to impose any tax upon him or his property which it has no right to impose it is

not taxation, but is a taking of his property without due process of law and without giving him the compensation required by the Constitution. Now, Congress has undertaken to impose certain taxes in an act passed to provide a government for the island of Porto Rico, and we are to ascertain, if possible, whether it is a constitutional tax.

It has sometimes been said that the power to acquire territory is derived from the express delegation of power to declare war and make treaties, and that the power to govern the territory is implied from this implied power to acquire it; and it has also been said in some cases that the power to acquire territory is implied from the express power to admit new States into the Union, and that the power to govern it is implied from this implied power to acquire it. It has been said, also, in one or two cases, I believe, that the power to govern may result from the fact that the United States find themselves in possession and ownership of territory outside the limits of the States, and there being no other power that can govern it, Congress must do so as a matter of necessity. But counsel on the other side find the power in that clause of the Constitution which authorizes Congress to dispose of and make all needful rules and regulations respecting the territory, or other property, belonging to the United States. It seems to be a sort of fugitive and migratory power, and up to this time it has not been permanently located in any particular part of the Constitution; but as we admit its existence, it is not necessary now to attempt to locate it.

The act of April 12, 1900, is the first one in our history in which an attempt has been made to impose taxes or duties upon goods because they are shipped from one Territory to the States and other Territories of the United States. Under

this act goods sent from New York or New Mexico to Porto Rico, or from Porto Rico to New York or New Mexico, are required to pay import duties and internal taxes, while the same kind of goods sent from New York to New Mexico or any other Territory, or from another State or Territory to New York or New Mexico, are not subject to any such charges. It requires but little argument, if any, to show that this is a tax on commerce, or that, if not, it violates the rule of uniformity, and, in fact, it is substantially admitted that it does so if the rule is applicable.

The act of April 12, 1900, in its third section, provides that—

"On and after the passage of this act, all merchandise "coming into the United States from Porto Rico and coming "into Porto Rico from the United States shall be entered at "the several ports of entry upon the payment of 15 per cent. "of the duties which are required to be levied, collected "and paid upon like articles of merchandise from foreign "countries; and in addition thereto, upon articles of mer- "chandise of Porto Rican manufacture coming into the "United States and withdrawn for consumption or sale upon "the payment of a tax equal to the internal-revenue tax "imposed by the United States upon like articles of mer- "chandise of domestic manufacture."

And it is also provided that—

"On all articles of merchandise of United States manu- "facture coming into Porto Rico, in addition to the duty "above provided, upon the payment of a tax equal in rate "and amount to the internal-revenue tax imposed in Porto "Rico upon like articles of Porto Rican manufacture."

And the fourth section of the act provides that—

"The duties and taxes collected in Porto Rico in pursu-
"ance of this act, less the cost of collecting the same, and the
"gross amount of all collections of duties and taxes in the
"United States upon articles of merchandise coming from
"Porto Rico, shall not be carried into the general fund of
"the Treasury, but shall be held as a separate fund and shall
"be placed at the disposal of the President to be used for
"the government and benefit of Porto Rico until the govern-
"ment of Porto Rico, herein provided for, shall have organ-
"ized when all moneys theretofore collected under the pro-
"visions hereof then unexpended shall be transferred to the
"local treasury of Porto Rico."

It is further provided in section 14 that—

"The statutory laws of the United States not locally inap-
"plicable, except as hereinbefore or hereinafter otherwise
"provided, shall have the same force and effect in Porto
"Rico as in the United States, except the internal-revenue
"laws which, in view of the provisions of section three, shall
"not have force and effect in Porto Rico."

Five things are to be especially noticed by the court in considering these parts of the act, which are the only ones involved in these cases: First, that it imposes duties and taxes upon goods sent here from the island for consumption or sale, or sent from here to the island for consumption or sale, but imposes no duties upon goods passing to or from other Territories; secondly, that it refers to the general tariff law of the United States for the purpose of ascertaining the amount of the duties and the amount of the internal taxes to be imposed upon articles of Porto Rican manufacture brought here for sale or consumption; thirdly,

that it thoroughly recognizes a distinction between the so-called duties imposed and the internal or inland taxes and excises which are imposed by other laws of the United States and by this law on Porto Rican manufactures; fourthly, that the United States internal or inland taxes or excises are not imposed upon the products of Great Britain, France, Spain, or any other foreign territory imported first into Porto Rico and then brought here from there, but only on "articles of merchandise of Porto Rican manufacture;" and, fifthly, that articles imported into Porto Rico from foreign countries are not required by the terms of the act to pay the local Porto Rican internal-revenue taxes or excises, while "all articles of merchandise of United States manufacture coming into Porto Rico" are required to pay such taxes and excises in addition to the duty.

In the first place, let us inquire what is a duty on imports within the meaning of that clause of the Constitution which confers the taxing power upon Congress. This question has been answered by this court in at least three well-considered cases—Brown *vs.* Maryland, in 12 Wheaton, 419; Woodruff *vs.* Parham, 8 Wall., 123, and Brown *vs.* Houston, 114 U. S., 642—in which it was distinctly held that the word "imports," as used in the Constitution, meant only articles brought into this country from a foreign country, and that "exports," as used in the clause prohibiting the States from taxing exports, meant only articles sent from this country to a foreign country. In Woodruff against Parham especially the whole subject was carefully examined and elaborately discussed, and the reasons for the conclusion were stated by Mr. Justice Miller in his usual clear and forcible manner.

It is perfectly clear from the provisions I have read that it

was the intention to lay and collect both import duties and internal taxes or excises upon the products of Porto Rico brought to the States, and to collect import duties, together with the Porto Rican internal taxes, upon all articles sent from the United States to that island. It is, therefore, an attempt to impose upon domestic goods carried from one domestic port to another for sale or consumption a duty which, under the Constitution, as this court has interpreted it, can be imposed only on goods brought here from foreign countries. If the word "imports," as used in the Constitution, includes only articles brought from foreign countries, and the words "duties on imports" mean only charges imposed upon such goods, then it follows, of course, that the power to impose them is limited to articles brought here from such countries. If the power exists to impose the "duties," as provided by this act, it is not conferred by the clause which delegates the taxing power, but must be included in the authority conferred by the clause authorizing Congress to dispose of and make all needful rules and regulations respecting the Territory, or other property, belonging to the United States, and it is in this latter clause that the counsel for the Government claim to find it. But, unfortunately for their contention, the act shows plainly upon its face that it is an act to raise revenue and not merely an act to provide for the government of the Territory; it shows plainly upon its face that it is not an act to impose local taxes upon the persons and property of the inhabitants of the Territory alone for local purposes, but an act to raise revenue by taxing persons and their property in every State and in every Territory in the United States. It not only taxes persons and property in New York

and every other State when it comes there from Porto Rico, and because it comes there from that island, but it taxes the commerce of the people of New York and of every other State, because, in carrying on that commerce, they send their property to Porto Rico for sale. So far as the act provides for a local government in Porto Rico, and so far as it affects only the local affairs of the island, it may be regarded as a proper exercise of the power to govern Territories under the Constitution; but so far as it legislates upon matters not local in their character, but relating to and affecting rights and interests in the States, its validity must be tested by the provisions of the Constitution applicable to those rights and interests.

The fact that the net amounts of the taxes and imposts are, by the provisions of the act, appropriated for use in Porto Rico no more affects the character of the taxes or imposts than if they were collected without such provision and afterwards appropriated for use in the island or for use in another Territory. A large part of the revenue to be raised under the act is collected in the United States, and the remainder at the ports in the island which are within the United States; but that which is collected in the island is collected on goods *in transitu* from the States, or arrived from the States and not delivered, and it is the proceeds of duties and taxes on the commerce of the States with a Territory of the United States. It is palpably an abuse of terms to say that such a tax is local and that it is imposed in the exercise of the power to govern the Territories. The very most that can be correctly said of it is that it is a national or general tax imposed for the purpose of raising revenue to be used for local purposes.

A local tax is one imposed upon persons or property in a particular district or locality. Even when Congress imposes a strictly local tax for local purposes in a Territory, or in the District of Columbia, it does not convert itself into a local legislature, but acts on this subject, as it does on all others, in its national capacity and exercises a national power. The fact that its acts may affect only a particular locality, or even a particular person, as when it grants a pension, or provides for the payment of a private claim, does not change the character of the power it exercises. All its powers are national, though they may be used in particular cases for local or private purposes. The government of the Territories and the raising of revenue to be used in supporting and conducting the political organizations created for them by Congress certainly involve the exercise of national power. They are the common property of the whole people; they are parts of the national domain; their welfare is a part of the general welfare and their defense is a part of the common defense.

When this revenue is raised by taxation on persons or property outside of a Territory, as well as inside of it, as is the case with all our import duties and internal taxes, the power to impose the taxation, if it exists, must be derived from the general taxing power conferred by the Constitution, and the rule of uniformity must be applied. I repeat, then, it can make no difference in the principle involved whether the revenue thus raised is appropriated for Territorial or other local purposes by the act under which it is raised or by a subsequent act. The substance of the transaction is that the taxation is imposed upon the whole people, the burdens are borne by the whole people, whether the col-

lection is made in a State or in a Territory. It is a general tax or charge imposed upon all the people of the United States, including the Territories, of which Porto Rico is one. It embraces the entire territory of the United States and cannot be uniform for the reason, among others, that it applies only to property passing to and from one particular part of the United States to other parts of the United States. If this can be done without violating the rule of uniformity, or violating the Constitution in any other respect, then it would follow that Congress may by law impose one rate of duty, or one rate of internal taxation, upon articles going from the States and other Territories to any one particular Territory, or coming from it to the States or other Territories, and a wholly different rate upon the same kind of articles coming to or from another State or Territory; because in all such cases the people of every State and Territory would pay exactly the same duties and taxes upon all the goods coming or going to each one of the States and Territories to which the act applied. But I insist that there is no provision in the Constitution, express or implied, which authorizes the passage of such acts by Congress; that they are not constitutional regulations of commerce between the States and Territories; that they are not constitutional exercises of the taxing power, and that they are not authorized by any clause from which the power to govern Territories can be implied.

In two of the cases now here the owners of the goods, who were citizens and residents of the State of New York, sent them to Porto Rico consigned to themselves or their agents for sale there, and upon their arrival they were taken into the possession of the United States authorities and held until

they surrendered to the Government part of the value of their property. If they had not complied with the demands made upon them the whole of their property would have been sold—confiscated—without judicial process of any kind, their business would have been destroyed, or, at least, seriously injured, and they would have had no redress whatever if this legislation is valid.

This property was of a kind which is recognized as a proper subject of exclusive ownership and dominion wherever the common law or the civil law prevails. Its status did not depend upon any local law or custom, nor did its owners commit any act of forfeiture or abandonment, unless they did so simply by carrying it into a Territory of the United States. Could Congress, otherwise than by the constitutional exercise of the power of taxation, or by condemnation and compensation, deprive the owners of this property, or of any part of it? Would this seizure and sale, or this seizure and release only upon payment of a tribute equal to a certain percentage upon its value, be due process of law, unless the seizure was for the purpose of enforcing the collection of a lawful tax, or for some public purpose and compensation made? These, as I conceive, are the vital questions to be determined in these cases, because we cannot find any other authority in the Constitution justifying such a proceeding, unless it is implied from the implied power to govern the Territory; so that, in its final form, the question is whether Congress, in the exercise of that power, can do in a Territory of the United States what no one has ever before pretended it could do in a State, what a State itself could not do within its own limits, and what no Territorial legislature could be authorized by Congress to do.

So far in discussing this tax I have denied its validity only on the ground that there is no clause in the Constitution delegating the power to impose it; that it is an attempt to tax interstate commerce, an attempt to legislate concerning the affairs of the States under the guise of governing a Territory, and is contrary to the whole theory and practice of the Government from the time of its organization; but it is not necessary to confine the argument to this general view of the subject, for the act plainly violates that express provision of the Constitution which declares that "no tax or duty shall be laid on articles exported from any State." It does not provide merely that Congress shall not impose such a tax or duty, or that the President shall not do so, but positively and broadly that it shall not be done at all by anybody.

In Almy *vs.* California, 24 Howard, 169, this court, in considering that clause of the Constitution which prohibits a State from laying a tax on exports, held that a shipment of gold from California to New York was an export to the State of New York within the meaning of that word as used in that part of the Constitution; but in Woodruff *vs.* Parham, 8 Wall., 123, and Brown *vs.* Houston, 104 U. S., 622, where the whole subject was carefully examined, that decision, so far as it held that goods were exported when sent from one State to another, was overruled, and it was decided that the provision of the Constitution then under consideration applied only to articles sent from a State to foreign countries.

Now, if the same construction should be given to the clause prohibiting the General Government from laying such a tax as was given to it in the case of the States, as long as Porto Rico remained a foreign country, or a part of

a foreign country, however long or short this court may find that period to have been, a tax or duty laid upon the products of one of the States because they were exported to that island was, undoubtedly, an export tax or duty in violation of this express provision of the Constitution. It matters not who imposed the tax, whether it was the President or Congress, if it was done under color of authority of the United States; nor does it matter where it was collected, for, if it was collected under color of authority of the United States, it was an export tax. It was a charge imposed upon the goods because they were exported from the States, and the goods were seized at the place where they were to be delivered in the foreign country by the authorities of the United States and the payment of the tax was exacted before the owner could secure possession of them. The place of payment is wholly immaterial if the authorities of the United States were at that place and enforced the payment, because it could not be constitutionally exacted by them anywhere.

In the case of Brown *vs.* Maryland Chief Justice Marshall said:

"Now suppose the United States should require every exporter to take out a license for which he should pay such tax as Congress might think proper to impose; would Government be permitted to shield itself from the just censure to which this attempt to avoid the prohibitions of the Constitution would expose it, by saying this was a tax on the person, not the article, and that the legislature had a right to tax occupations. Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on the merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for *this outrage*, were the Government to say that export-

ation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?"

Is there any difference between the stationing of revenue cutters in the open sea to arrest articles of commerce *in transitu* and demand a tax before they can proceed and the stationing of United States officials at a port in the island of Porto Rico to demand the payment of a tax before the goods can be delivered there to the owner or consignee?

If the United States should, by treaty or other arrangement with Great Britain, Germany, or France, for instance, secure the privilege of maintaining officials at their ports with authority to collect a certain percentage upon the value of all goods brought there from this country before the goods could be delivered to the owner or consignee, would any one contend for a moment that it was not a tax upon exports? It would not be a British, or a German, or a French import duty, because it would not be imposed under their laws or for their benefit; it would not be a United States import duty, because this country could not impose such duties upon goods imported into other countries.

The case supposed is precisely the case we have to consider here. The officials of the United States were in a foreign country with full control for the time being over its ports and all other places. The ports were opened by these authorities to the commerce of the United States, and to all neutral nations in articles not contraband of war, and, in accordance with the general privilege thus extended, certain citizens of the United States, and one British subject, ex-

ported certain articles of merchandise from the States of New York, Pennsylvania, and Maryland to Porto Rico, and upon their arrival there the United States authorities took possession of them and exacted payment of the tax because they had been thus exported. No such tax was imposed upon similar goods produced in Porto Rico, or owned and held there before or at the date of the proclamation of the executive order, or the passage of the act, and, in addition to all this, the proceeds of the tax were received by the United States and applied to such purpose as the United States chose. If all this does not amount to the imposition of a tax on exports, then it is clear that such a tax is imposed only within the meaning of the Constitution when the collection is actually made at the port of departure in a State. To hold that the place of collection determines the character of the tax would be to permit a mere incident or detail of the transaction to control the whole question of power. The very essence—the vital force—of the constitutional provision is to prohibit the imposition of any tax upon articles exported from a State—to absolutely prohibit the thing itself, and not merely to prohibit the collection of such a tax at a port from which the exportation is made.

But, if your honors please, this court has never given to the words "articles exported," used in the clause which prohibits the imposition of a tax or duty on articles exported "from any State," the same meaning that was given to the word "exports" as it stood in the prohibition upon the States. On the contrary, the opinion of the court, delivered by Mr. Justice Miller, in Woodruff *vs.* Parham, shows very clearly that different constructions must be given to the two clauses. Although holding that the exports which the States were

prohibited from taxing were only such articles as were sent to foreign countries, he said:

"Is the word imports here used intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State to another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the 9th section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not at the same time exported from the former."

This language shows that he did not think the general clause prohibiting all taxes or duties upon exports from any State applied only to articles carried to a foreign country, but applied to all articles taken out of a State for sale, no matter where they were going; and that is evidently the true construction of the clause, because, if it is not, Congress may lay one rate of duties upon articles exported, for instance, from the State of Pennsylvania into another State, and a very different rate of duty upon the same article exported from California to another State, or from New York to another State, because, if the power exists, it is not subject to the rule of uniformity. It would be very strange if the framers of the Constitution, after having carefully provided for a certain degree of uniformity in the imposition of direct taxes by requiring them to be apportioned according to numbers, and requiring absolute geographical uniformity in the case of indirect taxes—that is, duties, imposts and excises—should then have put a clause into the Constitution under which Congress could lay destructive taxes

upon the trade and commerce of the States, and not requiring them to be uniform anywhere, or in any respect. This clause, this absolute prohibition, must be construed as applying to every export from a State, whether it goes to a foreign country or not.

Any other construction would defeat the whole purpose of the Constitution in relation to this subject, and enable Congress to break up and ruin the commerce of some of the other States by the imposition of discriminating taxes and duties upon their products, when sent beyond their limits for sale. The very purpose of the prohibition was to prevent discriminations against one State and in favor of another, or against one section of the country and in favor of another. If Congress can impose a duty or tax upon tobacco exported from the State of production, or upon cotton, or upon oranges, or figs, or fruits, which are produced mainly in California and Florida, it can ruin the industries and the trade of certain States. It was to prohibit this very thing that the clause was inserted in the Constitution.

But suppose the court should take the other view of it, and hold that both clauses apply only to articles exported to a foreign country? Then, if Porto Rico was a foreign country during all the time the President was laying and collecting a tax or duty on articles shipped from the States, he was enforcing an export tax or duty, in violation of the Constitution, upon goods exported from the States to a foreign country. It is insisted by counsel that the island is still foreign for all fiscal and revenue purposes, and upon this ground alone they attempt to justify the imposition of duties upon merchandise imported from it.

Under the President's law, and under this act, when arti-

cles left the port of a State consigned to Porto Rico, they did so with a tax or duty imposed upon them because they were exported, and whether the tax or duty was collected at the port of departure, or *in transitu*, or at the port of destination before delivery, was wholly immaterial.

The claim, however, that Porto Rico is still foreign territory for any purpose is manifestly inconsistent with the provisions of the very act which imposes the duties and taxes complained of in these actions.

Section 16 of the act provides:

"That all judicial process shall run in the name of 'United States of America, *ss*: The President of the United States,' and all criminal or penal prosecutions in the local courts shall be conducted in the name and by the authority of 'The People of Porto Rico'; and all officials authorized by this act shall, before entering upon the duties of their respective offices, take an oath to support the Constitution of the United States and the laws of Porto Rico."

And then section 35 provides:

"That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and taken to the Supreme Court of the United States in the same manner, and under the same regulations, and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied."

According to these sections all officers in Porto Rico holding positions under the act are required to take an oath to support a Constitution which, if the argument made here is

sound, is not operative in any part of the Territory where their official duties are to be discharged, and this court, the highest judicial tribunal in the United States, is required to take jurisdiction in causes involving constitutional questions decided by inferior courts sitting outside of the United States at places over which the Constitution does not extend. These provisions clearly show the difficulties encountered, and the inconsistencies in which we necessarily involve ourselves, when we depart from the old way and undertake to extend our jurisdiction over Territory and govern its inhabitants without treating the Territory as a part of the United States and its inhabitants as citizens, or, at least, as persons entitled to the full protection of the Constitution.

Now, if your honors please, I shall detain the court no longer. It had been my purpose to discuss somewhat more at length the question as to the nature and extent of the power of Congress over the Territories, but it has been so fully and so ably argued by counsel on both sides in the various cases pending here, that I have concluded it would be an unnecessary trespass upon the patience of the court to attempt it. I am willing to concede that the power of Congress to govern the Territories is just as broad as any other power contained in the Constitution, but I claim that, like all other powers, delegated or implied, it is limited and controlled by every provision of the Constitution applicable to the subject over which Congress proposes to legislate.

I make no apology for saying that, so far as the question of constitutional power to govern Territories was discussed in the case of Scott *vs.* Sandford, the argument of the court is unanswerable and the conclusions drawn from it are unassailable. On the question of constitutional power the

court was substantially unanimous, and such differences of opinion as existed arose mainly out of the application of the reasoning and the conclusions to the particular kind of property which was the subject of controversy. Slavery was a local institution: property in a slave did not and could not exist in this country, except by virtue of affirmative protective legislation, and the question whether that species of property was protected in a Territory, when there was no such legislation, or where there was congressional prohibitory legislation, was wholly different from the question presented in cases like the present, where the owners have taken or sent into a Territory of the United States articles which are conceded to be property in the constitutional and common-law sense of the term. It is perfectly plain that if there had been no question of slavery in the case referred to there would have been no division in the court.

Now, if the court had stopped when it had reached its conclusions as to the extent of congressional power, it is entirely safe to say that no justice on the bench would have dissented; and here is just where we stop in the present cases. But the opinion goes on to hold that the right of property in a slave was distinctly and expressly affirmed in the Constitution, and it therefore decided that the guarantees and limitations in the Constitution protected that species of property as well as others in the Territory, and that congressional legislation could not deprive the owner of his right to it. This is the part of the judgment of the court, this alleged misapplication of correct constitutional principles to the case of property in a slave, that called forth the dissent of some of the justices and the protest of a large part of the people. But we have no

such question here; we have no question as to the character of the property or the right of its owners to hold and enjoy it in any part of the country. The constitutional question is the same here as it was there; but the contestants have changed places. Then the unlimited power of Congress over the Territories was denied by the advocates of slavery, and now it is denied by the advocates of freedom. It is a strange transformation that has made the arguments in support of constitutional slavery in the Territories the most powerful weapons in the hands of those who are contending for constitutional liberty in every part of the land where the civil authority or military power of the United States is exercised for the government of people. If it is true that the Constitution protects no rights of person or property in the national domain outside of the States, it is most fortunate for the country that the discovery was not made until after more than a hundred years of security under the delusion that we had a free Government, and after our boundaries on this continent, the real home of our enterprise and our republican institutions, had been filled with free States, free Territories, and free men. But I do not believe there has been any delusion on this subject; I do not believe that the framers of the Constitution, or the people who adopted it, deliberately or by mistake, delegated arbitrary power to any man or body of men, and I look confidently to the judgment of this court for their vindication against such a charge.

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No. 501.—October Term, 1900.

HENRY W. DOOLEY ET AL.

vs.

THE UNITED STATES.

For briefs and arguments in behalf of the United States in this case see No. 456, De Lima vs. Bidwell.